Aaron F. Perry

ARGUMENT

OF

HON. AARON F. PERRY.

May it Please the Court:

When General Burnside requested me to assist the District Attorney on this occasion, he forebore to give me any instructions, except to present such considerations to the judgment of the Court as should seem to me right and proper. I have a distinct impression that he has no preference that the questions here presented should be heard before any other jurisdiction or tribunal rather than this; and that he wishes his proceedings to be here discussed by his counsel, chiefly on the broad basis of their merits; that they should be made to rest on the solid ground of the performance of a high and urgent public duty. The main argument which I shall present to the Court will, therefore, be founded on the obligations, duties, and responsibilities of General Burnside as a Major-General in command of an army of the United States, in the field of military operations, for the purposes of war, and in the presence of the enemy. I shall not place it on any ground of apology, excuse, or palliation, but strictly and confidently on the ground of doing what he had a lawful, constitutional right to do; and on the ground of performing a duty imposed upon him as one of the necessities of his official position. I shall make no plea of an exigency in which laws are suspended, and the Constitution forgotten, but shall claim that the Constitution is equal to the emergency, and has adequately provided for it; that the act

complained of here is an act fully warranted by law, and authorized by the Constitution. I shall support this claim by references to more than one opinion of the Supreme Court of the United States, and to other authorities.

But before advancing to the main argument, I beg leave to invite a few moments' attention to the paper which is offered as a basis for the proposed action of this Court. It is a petition purporting to relate certain incidents or transactions which befell Clement L. Vallandigham, who is stated to be here in the city. No reason is shown why these statements could not have been authenticated by his own signature and affidavit. In the nature of the case, his attorney, Mr. Pugh, could have had little, if any, personal knowledge of the circumstances related. Mr. Vallandigham, if any one, had knowledge of them. Yet Mr. Vallandigham does not sign his own petition, nor make any affidavit. Mr. Pugh, his attorney, makes affidavit that he "believes" the petition to be true. Is there any reason here shown why, if an affidavit be required, as undoubtedly it is, it should not be made by the party knowing the facts? Why should the general rule be set aside in this proceeding, which requires an affidavit to be made by the person who knows the circumstances, or, at least, that good ground be stated for offering the affidavit of another? I do not care to multiply remarks on this part of the case, but refer the Court to *Ex parte* Dorr, 3 How. 103, for an example of great strictness, in applications of this description.

The petition thus vicariously made and sworn to, on behalf of Mr. Vallandigham, presents some peculiarities of structure, partly as matter of rhetoric and partly as matter of substance, which can not be entirely overlooked. It relates that the petitioner is a native-born citizen of the State of Ohio, a fact which may be interesting, but how it can be thought to be material is not apparent. A native-born citizen of South Carolina, or a naturalized citizen, would be entitled to the same legal immunities. The petitioner next informs the Court that he is not enlisted or commissioned in the land or naval forces of the United States, nor called into actual service as one of the

militia. On this allegation the main argument for petitioner is grounded. It is implied by the whole argument, if not distinctly admitted, that if he had been enlisted or commissioned in the land or naval forces of the United States, or had been called into actual service as one of the militia, the arrest might have been made. Having thus drawn a broad line of demarkation between himself and those in the actual service of their country in a military capacity, he relates that, "nevertheless" he was arrested. The circumstances of the arrest are rhetorically stated; but, in substance, nothing more is made of it than an arrest. It was done, he says, between two and three o'clock in the morning; done in his dwelling-house; done in his dwelling-house in which his family then were. His house was surrounded; surrounded by about one hundred soldiers; soldiers in uniform and armed, acting under the direction of General Burnside. These soldiers then and there, he says, broke the outer door and two inner doors; not only broke them, but violently did it; that they seized the petitioner, seized him by overpowering numbers, and imprisoned him against his will. If petitioner had imagined it possible there might be those whose good opinion he valued, who might suspect him of want of enterprise, or want of activity in allowing himself to be captured, and who might look upon it as wearing unheroic aspects, and as tending to an anti-climax in his career, then this part of the petition might be useful in his defense. It is graphic and explanatory. He was undoubtedly captured, not with his consent; perhaps unexpectedly. And it must be confessed that the rehearsal carries with it more or less of the sound of aggravation. If these men had not been in uniform; if there had been only seventy-five instead of a hundred; if they had broken open only two doors instead of three, or broken them more gently; if they had merely arrested him, and had not "seized" him, or had not done it by "overpowering numbers," or had acted the little drama at precisely midnight or at sunrise or at noon, I apprehend the legal effect would have been the same as now. This rhetorical literature is, for the purposes of legal inquiry, redundant. But in another particular there is no redundance. It is

not stated, nor does the attorney, in his affidavit of belief, venture upon the assertion that any thing of all these circumstances was wanton or unnecessary. It is not charged that more men were there, or that more violence was used in entering the house than was necessary, nor that petitioner has been subjected to harsh treatment or useless rigor. It stands on the petition, after all, as a simple military arrest—no more.

The petition further relates, not that the arrest was made without probable cause, or without a warrant, or without a charge supported by oath or affirmation, but in effect, that all three of these things did not exist together. It was, it is alleged, "without any warrant issued upon probable cause supported by oath or affirmation, and in contempt of his rights as an American citizen." And this is the only part of the affidavit which goes to charge the arrest as illegal. It is stated, in another part of the petition, that petitioner is not, under the Constitution, amenable to be *tried* by a military commission; but unless the seizure "in contempt of his rights" is equivalent to an allegation that the arrest was illegal, there is no allegation of illegality.

The petitioner states further that he was furnished with a copy of the charge and specifications against him, which he exhibits and makes part of his petition, and which will be more particularly referred to in the course of the argument. For the present purpose it is enough to notice that the charge was, in substance, a charge of active disloyalty toward his own government, and of active sympathy with its enemies, now in battle array against it. Neither the petition nor affidavit denies that there was probable cause for the charge, nor that the charge was honestly believed by General Burnside to be true, nor that the charge was, and is in fact, a true charge. But the petition, claiming the arrest to have been made by soldiers, and by the command of a Major-General of the United States, declares it to be "manifest oppression under color of military authority," and invokes the action of this Court for his relief. It appears that a portion of these allegations were made to show that this Court has jurisdiction. By the fourteenth section of the Judi-

ciary Act of 1789, the jurisdiction of this Court, in cases of Habeas Corpus, is confined to instances where the applicant is in custody, "*under or by color of the authority of the United States*," etc. (Dunlop's Dig. 53.) That is to say, this application must be brought under one of two categories, or the Court has no jurisdiction: 1. The applicant must show himself in custody under the authority of the United States. Or, 2. He must show himself in custody by color of the authority of the United States. I submit that this petition shows that petitioner does not place himself in either category. The whole argument of Mr. Pugh is directed to the point that there is no authority in any branch or part or officer of the Government of the United States to make such arrests. If he is correct, the arrest is clearly not under the authority of the United States. His argument is that the act is wholly unauthorized and unconstitutional: in effect, that the United States is a corporation; that the Constitution is its charter; that this arrest is not authorized by the charter, and, in legal phrase, is *ultra vires*. If it be admitted to be legally done under the authority of the United States, the admission takes away all ground for a Habeas Corpus; for the end of a Habeas Corpus is to ascertain whether a commitment is legal. There may be cases where an arrest is made under the authority of the United States, in which all papers are in due form, and the authority indisputable, but where the process was set in motion by some groundless, wanton, or fraudful device. In such cases, I apprehend, the jurisdiction of this Court would be ample. But this is not claimed to be a case of that kind.

Indeed, the counsel for petitioner does not place the jurisdiction on this branch of the alternative. He denies, utterly, thoroughly, and without stint or qualification, that this arrest was, or could have been under the authority of the United States. He places the jurisdiction on the other ground, viz.: that the arrest was "*by color* of the authority of the United States."

What is meant by color in law? An arrest under color of authority would be an arrest by proceedings apparently legal,

but which, by reason of some irregularity or defect, would be capable of being shown to be unauthorized. (Wharton's Law Dic. 157; 1 Bouvier's Law Dic. 243.) The case, *Ex parte* Joseph Smith. (3 McLean, 121,) is an example of arrest by *color* of authority. The warrant was in due form. The officer had full power. But the affidavit was defective on which the warrant had been issued. In the present case there was no mistake or defect, no fallacious appearance or pretext, nothing pretended or supposed which has been found to be unreal. The authority was perfect, or it was nothing. It was wholly sufficient, or wholly wanting. It was a perfectly legal arrest, or it was an open, flagrant violation of the peace. Whatever else may be said of it, it can not be said to be by *color* of any thing. The fact that it was done by a Major-General, and by soldiers in uniform, do not give it the *color* of authority. Unlawful and unauthorized acts done by soldiers or officers of the United States are not by *color* of authority. "*To give color to the plaintiff is to assign to him, in the plea, some colorable* (i. e., *defective*) *but fictitious title*," *etc.* (Gould's Pleadings, 348.) I submit that it would be an abuse of language to call the arrest made by General Burnside a defective or fictitious thing. It was completely authorized, or it had no colorable excuse.

The petition, therefore, makes a case of arrest which was neither "under or by color of the authority of the United States," and consequently not within the jurisdiction of this Court; or it makes a case of arrest every way legal and fully authorized, in which no writ of Habeas Corpus should be granted.

Having sufficiently called attention to these preliminary points, I advance with more satisfaction to the main argument. The careful analysis of the petition, already made, will be found to have its uses and bearings in the argument which I shall now offer, not altogether disproportioned to the time which it has occupied.

Mr. Pugh has correctly argued that a Habeas Corpus is in the nature of a writ of error to examine into the legality of an arrest or commitment. If it appear that the arrest or commitment complained of was a legal act, the writ of Habeas Corpus

will not issue; because its whole office is to inquire into the legality of the act, and the Court will not do a nugatory and useless thing.

A Habeas Corpus does not meddle with arrests legally made. There are well-known cases where the civil magistrates and officers of the peace make arrests on sight and without warrant. In such cases the legality depends upon circumstances to make a case where an arrest is allowed by law without a warrant. These circumstances, if they exist, *are* a warrant, or equivalent to it. So, if war or any other state of affairs exist, which by recognized principles authorize, require, and justify an arrest by military force, no Habeas Corpus can meddle with it. The order which sends an army to make war, is all the warrant it needs for every necessary act of war. It may capture and imprison enemies, and not those in arms only. "The whole," says Vattel's Law of Nations, p. 346, "is deduced from one single principle, from the object of a just war, for when the end is lawful, he who has a right to pursue that end has, of course, a right to employ all the means which are necessary for its attainment." One of the undoubted means of war is to take life. As the greater includes the less, the right to take life implies the right to take every thing.

"All those persons belonging to the opposite party (even the women and children) he may lawfully secure and make prisoners, either with a view to prevent them from taking up arms again, or for the purpose of weakening the enemy." . . . "At present, indeed, this last-mentioned expedient is seldom put in practice by the polished nations of Europe: women and children are suffered to enjoy perfect security, and allowed permission to withdraw wherever they please. But this moderation, this politeness, though undoubtedly commendable, is not in itself absolutely obligatory, *and* if a General thinks fit to supersede it, *he can not be justly accused of violating the laws of war.*" (Vattel, p. 352, 346.)

Persons so captured or arrested are prisoners of war.

"For the same reasons, which render the observance of those maxims a matter of obligation between State and State, it becomes

equally and even more necessary in the unhappy circumstance of two incensed parties lacerating their common country. (Vattel, 425.)

The application to citizens in revolt of the rules of war, is in the interests of mercy. If they should be put upon trial before a jury in such moments of overwhelming excitement, one of two results would follow.

If the jury should not be so divided by the passions raging through the whole population as to disagree, and thus bring the law into contempt, their passions would take them to one side or the other. Men might be let loose, and certainly would be, whom the safety of the State required to be restrained, or more probably convicted and executed without sufficient evidence. When society is imperiled by intestine war, the passions rage which occasioned the war. The entrails of the volcano, covered for a while, have at length broken forth. Smoke and ashes obscure the sky. Fiery floods pour along the earth. No good man could be impartial. Who claims to be impartial impeaches himself. Believing his government to be in the right, interest, feeling, lawful duty compel him to uphold it with all his power. He has no decent pretext, certainly no lawful excuse, for throwing on others a duty to uphold the government which he shrinks from. It is each man's duty as much as any other's. Its enemies are, and in the nature of the case must be, his enemies; its friends his friends. The law allows him no other position. On the other hand, he who believes the government to be wrong has no choice but to sympathize with its enemies. He must assist them, and will assist them, either openly or by secret and suppressed sympathy. On one side or the other, men go to the jury-box under the influence of deep feeling. The law of nations, or rather the laws of war, which in civil commotions authorize the opposing parties to treat each other as prisoners of war, is not, therefore, an aggravation of dangers, but an amelioration of them. Vattel, p. 426, assigns two reasons for it: One, lest the civil war should become more cruel. The other, the danger of committing great injustice by hastily punishing

those who are accounted rebels. "The flames of discord and civil war are not favorable to the proceedings of pure and sacred justice." More quiet times are to be waited for.

It appears, then, that in time of war, the fact of war authorizes and legalizes arrests; and the order for an army to make war is its sufficient warrant for making such arrests as are justified by the laws of war. I am not now inquiring whether the arrest of Clement L. Vallandigham is justifiable by the rules of war. That inquiry will follow in its due course. I am now adverting to the laws of war, and showing that arrests of some kinds are authorized. These principles are, I suppose, undisputed and indisputable. It follows that such arrests are legal; and by showing the existence of circumstances making the arrest legal, a sufficient answer is made to a Habeas Corpus. The writ is not in such case suspended. It is respected, upheld, enforced, and performs all the office a Habeas Corpus can in any case perform.

It is a logical consequence, unavoidably resulting from the premises, that while all wars, insurrectionary or foreign, bring into action the laws of war, they do not, necessarily, suspend the writ of Habeas Corpus. The Legislature may enact a statute making some act a crime which was not so before, and authorizing persons guilty of it to be arrested and held; or authorizing a writ of civil capias, under which the body is seized and held in circumstances not before authorizing such an arrest. These things not only may be done, but are frequently done. No one thinks of them as a suspension or abolishment of Habeas Corpus. So, in war, the laws of war authorize arrests which were not authorized until those laws were brought into play by the fact of war. In these cases Habeas Corpus is no more suspended than in the others. Full force and effect may be given it while enforcing the laws of war. And this is the constitutional view. The power to declare war is broadly given; the power to suspend Habeas Corpus is given distinctly from the war power, and in addition to it, "when in cases of rebellion or invasion *the public safety may require it.*" If the operation of the laws of war were a suspension of Habeas Corpus,

every thing had been said when Congress was authorized to declare war. No further declaration was needed. It is against correct rules of construction to hold that Habeas Corpus suspension is intended to be merely one of the means of war. They might as well have provided for making war in one paragraph, and then have provided, as a separate and distinct power, authority to kill and capture enemies in battle. War may be made. In addition to making war, Habeas Corpus may be suspended in certain contingencies.

Learned counsel, on the other side, has called our attention to the act of Congress of March 23, 1863; and to another act of Congress, showing that the offense with which petitioner is charged is an offense against the civil law, and punishable under a law of Congress; one for which he may be held and tried before the civil tribunals. Neither of these acts interferes with my argument. The first section of the act of March 23, 1863, authorizes the President, in contingencies there named, to suspend the writ of Habeas Corpus. The learned counsel says he has not suspended it. Undoubtedly, if he had suspended it, there would be an end of this case. I do not claim that it is suspended. My whole argument proceeds on the ground that it is not suspended, but in full force. That act of Congress is based upon the idea that arrests had before that time been made, and might again be made, which could only be sustained by a suspension of Habeas Corpus; in other words, arrests, not sustainable by the laws of war, or by any other law, except the extreme demands of public safety when "in cases of rebellion or invasion the public safety may require." The suspension of Habeas Corpus is a suspension of a right to inquire into the legality of an arrest: for if it can be shown that the arrest was lawful, there is no need to suspend the Habeas Corpus. War had long before been recognized and legalized. Nothing is more certain in law than that military men, in time of war, are legally protected in doing the acts authorized by the laws of war. Such acts are in no sense unlawful. But this act of Congress, sec. 4, provides an indemnity for acts done by the President, or under his authority, which was wholly unnecessary

unless it contemplated acts not defensible under the laws of war. The act neither reprobates nor prohibits. It contemplates the necessity, allows the act, and provides for it. One of two constructions is necessary. It refers only to such arrests as have been made under a suspension of Habeas Corpus, in which construction it does not apply to this case; or it provides for irregular arrests, without process or with defective process, which might, if Habeas Corpus were sustained, be discharged under it. But in no event does it contemplate the discharge of an arrest by Habeas Corpus, unless or until the steps there pointed out shall have been first taken, or the contingency there provided for shall have happened. If learned counsel, therefore, bring themselves under the operation of this act, they defeat their application here, and are remitted to another mode of relief. If this act does not apply, it is outside of the case, and need not be further discussed. If it does apply, it is fatal to this petition. I understand learned counsel to admit that it does not apply here, and in this I agree with him. It is an undoubted principle of public law, that persons captured or seized under the laws of war are prisoners of war. They may be guilty of civil offenses, punishable by the civil tribunals. Imprisonment under the laws of war does not discharge them from their offenses. They are or may be held until they can be brought to a legal trial in a time of restored tranquillity. Necessity forbids their running at large; humanity forbids to put them on trial at a time so unfavorable to the proceedings of pure and sacred justice. (Vattel, 426.) The act of March 23, 1863, is expressly limited, in its operations, to prisoners who are held "otherwise than as prisoners of war."

The President's proclamation of September 24, 1862, suspending Habeas Corpus and declaring martial law, is not referred to in the act of March 23, 1863, nor published in the regular edition of laws. I have no knowledge that it has been withdrawn or superseded, otherwise than as a matter of inference from the act of Congress. If it remains in force, it ends this application. I choose rather not to rely upon it. There is no inference to be drawn from the act of Congress against that

part of it which proclaims martial law; but in the view I am urging of the principles of public law, such a proclamation can perform no office except to give publicity to a fact before existing. To whatever extent the fact of war brought into play the laws of war, those laws had their full force without a proclamation; to that extent a proclamation was proper, but unnecessary. Beyond that it was nugatory, and could not add one cubit to the stature of war. A proclamation of martial law is often confounded with, and considered equivalent to, a suspension of Habeas Corpus. But this is inaccurate. If the President had authority to issue such a proclamation, and has not rescinded it, nothing can be more clear than that Congress had no power to rescind it. But I do not choose to embarrass the discussion by relying upon a document which there is plausible ground to suppose Congress might not have considered in force.

Having cleared the field of argument from such chances of misapprehension and confusion as prudence required, I recur to the proposition advanced by learned counsel on the other side, and which I had intended to advance myself, though scarcely necessary to be mentioned.

A proceeding of Habeas Corpus is in the nature of a writ of error, to inquire into the legality of the commitment or arrest. If the application shows the arrest complained of was a lawful one, the Court will go no further. It will not put a defendant to show, by his answer, what is already shown by the petition. On this I suppose I have the happiness to agree with learned counsel on the other side. I have also the happiness to agree with him that the right of Habeas Corpus has not, in this case, been suspended, but is to be treated as in full force, with neither more nor less respect than is habitually paid to it in courts of justice.

I claim, then, that the facts before this Court show that the arrest of Clement L. Vallandigham, by Ambrose E. Burnside, a Major-General in the United States service, commanding in the Department of the Ohio, was a legal and justifiable arrest. For the facts showing its legality I rely, 1. On the petition and affidavit of the prisoner; 2. On facts of current public history of

which the Court is bound to take judicial cognizance. Among the facts of public history, I need recall but few. Unfortunately, the country is involved in dangers so many and so critical, that its people neither do nor can divert their thoughts to other topics.

There is on foot an organized insurrection, holding by military force a large part of the United States, and controlling the political organization of at least twelve States of the Union. It has put into the field armies of such strength that the armies of the United States have not been able to overcome them. Battles of great magnitude are fought, and prisoners mutually captured and exchanged. In short, we have, for two years, been in a recognized state of civil war, on a scale large and destructive, almost beyond historical comparison. This insurrection claims to have so much power as to be beyond the means of the government to overcome, and to be entitled to be recognized by foreign nations as an independent power. Were it possible to doubt the imminence of the danger, and extremity of peril from what we see around us, we should be warned of it by the admonitions of foreign governments holding the relations of friendly governments, and claiming to be impartial. They freely express the opinion that our danger is not merely extreme, but irremediable; that the Constitution, and all hopes founded upon it, must perish.

This insurrection has for impulse, feelings and opinions growing out of the past civil history of the country. As a matter of course it can not be, and as a matter of fact it is not, limited to places, or described by geographical descriptions. In some parts of the country it dominates society; in other parts it is dominated by the regular civil administration. We hear of no place so dark but that some weak prayers are uttered for the Constitution; and of no place so bright but that lurking treason sometimes leaves its trail, or shows, through all disguises, its sinister unrest.

The power and wants of the insurrection are not all nor chiefly military. It needs not only food, clothing, arms, medicine, but it needs hope and sympathy. It needs moral aid to sustain it against reactionary tendencies. It needs argument to represent

its origin and claims to respect favorably before the world. It needs information concerning the strength, disposition, and movements of government force. It needs help to paralyze and divide opinions among those who sustain the government, and needs help to hinder and embarrass its councils. It needs that troops should be withheld from government, and its financial credit shaken. It needs that government should lack confidence in itself, and become discouraged. It needs that an opinion should prevail in the world that the government is incapable of success, and unworthy of sympathy. Who can help it in either particular I have named, can help it as effectually as by bearing arms for it. Wherever in the United States a wish is entertained to give such help, and such wish is carried to its appropriate act, there is the place of the insurrection. Since all these helps combine to make up the strength of the insurrection, war is necessarily made upon them all, when made upon the insurrection. Since each one of the insurrectionary forces holds in check or neutralizes a corresponding government force, and since government is in such extremity as not safely to allow any part of its forces to withdraw from the struggle, it has no recourse but to strike at whatever part of the insurrection it shall find exposed. All this is implied in war, and in this war with especial cogency. "If war be actually levied—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." (4 Cranch, 126.)

The Constitution being paralyzed and suspended to the extent described, we may notice the situation and condition of the State of Ohio, where the petition states the arrest to have been made. Geographically it is midway between east and west, bordered on the south by Virginia and Kentucky, both States occupied by contending armies, and over which the tide of war advances and recedes according as its fortunes incline to one side or the other. On the north is Lake Erie, over which England and America hold a divided sway. In the event of a war with En-

gland, on the very verge of which we have sometimes seemed, a contest for supremacy on that great lake would be inevitable. Such a war is one of the hopes of the insurrection, and has been schemed for with amazing audacity. A military occupation of either line of railroad running through Ohio, from the river to the lake, would sever the North-western from the North-eastern States. The population of the State is made up of all the conflicting elements now lighting the blaze of civil war in the country. The feelings of all are represented here. None of the extremes and none of the means are wanting. That these elements should be carrying on a bloody strife in the immediate neighborhood, and no strife be kindled here, is improbable in theory and untrue in fact. The insurrection in Ohio is dominated by the federal authorities, and operates in disguise, but it meets and receives constant attention. The arguments for insurrection made in South Carolina are openly repeated in Ohio. The charges there made against the government and those who administer it, as a provocation for rebellion, are openly made here, and with not much difference in the degree of animosity. The South Carolina orators, it is true, draw a different conclusion from their arguments and charges from that which is drawn here from the same arguments and charges. There, for the reasons stated, they declare eternal hostility to the Union; here, eternal fidelity to it. The means to accomplish these diverse results, however, are the same. In South Carolina they propose to overthrow Lincoln and his minions, in order to destroy the Union; here it is proposed, in order to save the Union. There and here each foot steps in the other's track; the toes all point in the same way, but they claim to be traveling in opposite directions. It is not very long since the marshal of this district was obliged to call for military force to suppress a revolt in Noble County in this State; still later was a military force necessary to save Dayton from the ravages of a similar revolt. In numerous instances in Indiana military force has been necessary. These are all fingers of the same hand. Your Honor does not forget how recently the records of this Court were removed, in order to save them from the con-

tingencies of an invasion by insurrectionary forces; nor how recently, by voluntary labor, the people of this city raised embankments and forts to protect it from the insurrection. Nor is your Honor uninformed that these defenses are kept, day and night, in a state of preparation, armed and supported. This Court is sitting, as it were, in garrison. We are deliberating under the protection of the guns of Newport and Covington. At various parts of the State are camps. The streets of our cities are patroled by military guards. Has our government nothing to do that it should vex itself, and waste its means by these precautions, if not known to be necessary?

An inference is unavoidably drawn of the importance of a given field of operations, by the officers placed in charge of it. General Wright, who was first sent to command this Department, was a man eminent for military science and clear abilities. His undemonstrative habits and retiring manners prevented the high popular appreciation which he deserved. The next commander sent us is General Burnside, of Hatteras Inlet, of Roanoke Island, of Newbern, of South Mountain, of Antietam, of Fredericksburg; a General not inferior in ability, nor second to any other in the affections of his countrymen. With him comes that famous army corps, young in organization, but already old in sacrifices and in glory. Next in command, for Ohio, they send us the very Bayard of American volunteers, whose cool heroism at South Mountain was looked upon as an ample response to the high expectations formed of him from his accomplishments and previous services, and who crowned them all at Antietam Creek by performing there, with Ohio troops, trained under his own eye, a feat of arms fit to be compared with the far-famed passage of the Bridge of Lodi. If the government can afford such Generals for the safe places, what can it afford to the dangerous places?

Why are these men here? Have they, at any time since the war began, sought any other but the place of danger? They are here—they are sent here for war: to lay the same military hand upon this insurrection wherever they can find it, in small force or large force, before them or behind them, which they

have laid upon it elsewhere. They are not here to cry peace, when there is no peace; not here to trifle with danger, or be trifled with by it. They are patriot Generals, commanding forces in the field in the presence of the enemy, constrained by their love of country, and in the fear of God only, to strike. Are they to fold their arms and sleep while the incitements to insurrection multiply around them, and until words shall find their way to appropriate acts? Are they to wait until the wires shall be cut, railroad tracks torn up, and this great base of supplies, this great thoroughfare for the transit of troops, this great center and focus of conflicting elements, is in a blaze, before they can act? Must they wait until apprehended mischief shall become irremediable before they can attempt a remedy? Jefferson Davis would answer "Yes!" Traitors and abettors of treason would everywhere answer "Yes!" I seem to hear a solemn accord of voices rising from the graves of the founders of the Constitution saying "No!" And I seem to hear the response of loyal and true friends of liberty everywhere swelling to a multitudinous and imperative "Amen!"

I may as well here say what I have to say concerning the paper presented by General Burnside. It is eminently respectful to this Court and to the people. It is honorable to the feelings of the General, and creditable to his judgment. Anxious for the cause he represents, and needing the affections of the people to uphold him in his great work, it was natural, and it was proper, that he should desire not to be misunderstood. It was natural and proper that he should give his most sacred assurances of his purpose not to assail liberty but to defend it. But, in my judgment, it was not necessary. The General is modest—I will not say too modest. The people know him better than he seems to think. They know him by acts which speak louder than words. His principles and motives are as visible to them as the shining track of the sun. They know him as one of the first, then unheralded by fame, to bare his bosom to the bolts of this war. They know him as one whose political opinions and prejudices were strong against the present Administration, but who subordinated these to a sense

of the necessity of saving the Constitution. They know him as one who has passed through perils innumerable, and has borne, with equal constancy, victory and defeat; who, in all vicissitudes, has stood as a rock against which the waves of sedition dash and are broken. His acts are his explanation. He needed and will need no other.

I have listened with interest and attention to the comments and criticisms of the eloquent advocate for Mr. Vallandigham, on this paper. Considering his zeal, his ingenuity, and his duty as an advocate, I am gratified to see how little he found to complain of. We are entitled, since it has passed this ordeal, to rest upon it as not only substantially unobjectionable, but in form and language prudent. It was, of course, the duty of the advocate to imply, in his criticism, if he did not state, that liberty of speech is chiefly in danger from the Generals who fight to uphold it, and not from the politicians who seek to render the services of the Generals ineffectual. It was properly within the arts of advocacy to drop out of sight the fact that liberty of speech, with other sacred and indispensable rights, have no adequate guarantee or defense except in the safety of the government ordained to establish justice and secure the blessings of liberty to ourselves and our posterity. It was not in the line of his duty to remind us that the only way now to save liberty of speech is to save the government which was made to protect it. Let us imagine that at the large meeting addressed by Mr. Vallandigham, and during the delivery of his speech, an individual had risen from the audience and commenced there a harangue in favor of the liberty of speech. Who, then, would be the defender of free speech, the man who raised for it an untimely clamor, or the constable who should seize him and suppress the disturbance? The right of free speech is only one of the rights secured by civil liberty, and, like other rights, is subjected to some limitations necessary for the safety of all. Civil liberty is defined to be, "the liberty of men in a state of society, or natural liberty, so far only abridged and restrained as is necessary and expedient for the safety and interest of the society, state, or nation."

I understood the learned counsel to intimate that government would receive the unanimous support of the people of Ohio, if it would do nothing which displeased any of them. "Touch not the liberty of the citizen, and we, in Ohio, at least, will be unanimous." May it please your Honor, the liberty of the citizen is touched when he is compelled, either by a sense of duty, or by conscription, to enter the army. The liberty of the citizen is touched when he is forbidden to pass the lines of any encampment. The liberty of the citizen is touched when he is forbidden to sell arms and munitions of war, or to carry information to the enemy. Learned counsel is under a mistake. We, in Ohio, could not be unanimous in leaving such liberties untouched. The liberty to stay at home from war is at least as sacred as the liberty to make popular harangues. But since all these liberties are assailed by war, they must be defended by war. We, in Ohio, never could be unanimous in approving the action of a government which should force one portion of the population to enter the army, and allow another portion of it to discourage, demoralize, and weaken that army. Unanimity, on such conditions, is impossible. But this suggestion of unanimity is not quite new. The zeal of the advocate, the charming voice, the stirring elocution with which it is now reproduced, does all that is possible to redeem it from its early associations. But we can not forget that the same thing has played a conspicuous part in the history of the last few years. At the last presidential election it happened, as it had on all preceding similar occasions, that a majority of lawful votes, constitutionally cast, elected a President of the United States, and placed the federal administration in the hands of persons agreeing in opinion, or supposed to agree with that majority. It happened, as it had ordinarily happened before, that the minority did not agree with the majority, either as to principles or as to the men selected. It claimed to believe the majority in the wrong, and no minority could find provocation or excuse for being in the minority, unless it did believe the majority in the wrong. It is not now necessary to inquire which were right in their preferences and opinions. The minority were fatally wrong in

this, that they refused the arbitrament provided in the Constitution for the settlement of such controversies. The new administration must yield, because the minority found itself unwilling to yield. The old Constitution must be changed by new conditions, or run the risk of overthrow. In other words, it must be overthrown in its most vital principles, by compelling a majority to accept terms from a minority, accompanied by threats of war, or it might be nominally kept alive by consenting to abdicate its functions. All that the secession leaders proposed was, that they should be allowed to administer the government when elected, and, also, when not elected. They were willing to respect the constitutional rights of elections, provided it should be conceded that if they were beaten they should go on with public affairs the same as if they had been elected. They were willing to take the responsibility of judging what they would like to do, and all they asked was the liberty to do it. "Touch not our liberties, and we can be unanimous!" The same old fallacy reappears in every phase of the insurrection; sometimes with and sometimes without disguise. Neither change of wigs, nor change of clothing, nor presence nor absence of burnt cork, can hide its well-known gait and physiognomy. The insurrection will support the government, provided the government will support the insurrection; but the government must consent to abdicate its functions, and permit others to judge what ought to be done, before it can be supported. One of its favorite disguises is to desire to support the government, provided it were in proper hands; but to be unable to support it in its present hands. The proper hands, and the only proper hands for government to be in, are the hands in which the Constitution places it. If the whole country should believe any particular hands to be the most suitable, those hands would be chosen. He who can not support the government on the terms pointed out in the Constitution, by recognizing as the proper hands for its administration the hands in which the law places it, is not a friend, but an enemy of the Constitution. What he means by liberty is not that qualified liberty in which all may share, but a selfish, tyrannical, irresponsible liberty to have his

own way, without reference to the wishes or convenience of others. This notion of selfish and irresponsible liberty is an unfailing test and earmark of the insurrection. Whatever other appearances it may put on, it can always be known and identified by this. No darkness can conceal, no dazzling light transform it. Wherever it may be found, there is insurrection, in spirit at least, and, according to different grades of courage, in action also. This kind of liberty can not live at the same time with the liberty which our Constitution was ordained to secure. Government must lay hands upon it or die. Dangerous as its hostility may be, its embrace would be more fatal. Its hostility may, in time, destroy the government, but any government consenting to make terms with it is already dead.

My eloquent friend on the other side desires to know what may be General Burnside's notion concerning the people, that he should fear the effect of Vallandigham's speeches? On this subject I can only exercise my privileges of observation. I infer, from General Burnside's bearing and habits, that his opinions concerning the people are, in an eminent degree, respectful. I have an impression that he regards them and theirs with affectionate and undoubting confidence. I presume he thinks that if the people of Ohio can be persuaded that the war is a wicked one, they will give it a much less cordial support than they otherwise would. I presume he thinks well enough of them to suppose that if they can be persuaded to believe their government is striving to enslave them, they will resist it, with life and means and sacred honor. I do not suppose he is authorized to think so meanly of them as to imagine they would not make forcible resistance to an effort to enslave them. Three years ago, he might have imagined, as many others of us did, that such persuasions could never go beyond words, and would spend themselves in mere political heats. But he has seen the result of such experiments in South Carolina, Virginia, and over a large section of the Union. The people yet loyal to the Constitution have intrusted to him their sons, and he has seen them go down in battle on many contested

fields, to counteract the effect of just such persuasions. I infer that it has occurred to him, by this time, that there is danger of the effects of such persuasion. It would not surprise me to learn that he now looks back with regret, and wonders why the instigators and ringleaders could not have been seized before yet their treasonable words bore fruit in treasonable war!—why we ever felt justified in thinking so meanly of the people of any section of the country as to suppose they could be persuaded their liberties were attacked, and yet not make an appropriate resistance! Perhaps he may feel not a little distress when he reflects that all this bloodshed might have been saved, but was not, by a little timely vigor. I have not the least suspicion that he doubts the right of government to protect the people from such calamities. If it may crush treason in its blossom and fruitage, how much more in its beginning. I can imagine a patriot General—for aught I know, General Burnside may be the man—who should say to himself, "I, too, am one of the people. These men, who fight under my command, are my neighbors. Yonder men, who meet us in battle, are our countrymen. Have not these baleful experiments of an unbridled license of tongue been carried far enough? May we not, at length, cease to trifle, and do what is possible to check these rivers of blood, by obstructing the head-waters from which they flow! All other experiments having failed, may we not, as a last resort, listen to the dictates of common sense?"

I do not propose to follow learned counsel in all their comments on General Burnside's statement. I do not complain of criticism. I have said enough not to leave myself open to the suspicion of slighting the remarks offered by counsel. I am now at liberty to pay that statement the practical compliment of trusting it to stand on its own merits. But before I pass from the theme, I must acknowledge the respect paid to General Burnside's patriotism. It seems to be conceded that the purity and nobleness of his motives are unquestionable. Whatever criticism is bestowed on other things, when counsel approaches an allusion to motives, he is conscious of a pure atmosphere and a high presence. Like Moses approaching the burning bush, he

seems, as it were, to pull off hat and shoes, and acknowledge himself to be standing on holy ground.

Let us, then, turn to the petition of Clement L. Vallandigham, and see how it presents him. I know nothing, and desire to know nothing, of the man in this case, except what is shown by the papers before us. It is neither my habit nor my pleasure to incumber an argument with personalities. But I may say, and I will say, that if Mr. Vallandigham be a public man, aspiring to lead public opinion in this great crisis, and be, in fact, disloyal to the Constitution, or if he be of that bat-like nature, which flits and flickers in the twilight between patriotism and treason, so that it never can, at a given moment, be certainly known which side he favors, then

"May shame and dishonor sit
By his grave ever;
Blessings shall hallow it,
Never! No, never!"

The petition exhibits and sets forth a copy of the charge under which he was arrested. It shows us exactly the ground of his arrest. By referring to the charge and specifications, we have before us the case. It is not a little remarkable that no part of the charge or specification is denied. It stands for the purpose of this inquiry, as admitted.

[Mr. Perry read the charge and specifications as published in another place.]

It appears from this that he publicly addressed a large meeting of citizens. He was not expressing in secrecy and seclusion his private feelings or misgivings, but seeking publicity and influence. The occasion and circumstances show the purpose to have been to produce an effect on the public mind, to mold public feeling, to shape public action. In what direction? The charge says, by expressing his sympathies for those in arms against the Government of the United States, by declaring disloyal sentiments and opinions. He declared the war to be wicked and cruel, and unnecessary, and a war not waged for the preservation of the Union: a war for crushing out liberty and erect-

ing a despotism. What is this but saying that those who fight against the United States are in the right, and that it would be cowardly and dishonorable not to fight against the United States? In what more plain or cogent language could he urge his audience themselves to take up arms against their government? If those who heard him could not be incited to fight against a government by persuading them it was making an unjust and cruel war to crush out liberty, how else could he expect to incite them? If he did not hope to persuade them to join their sympathies and efforts with the enemies of the United States, by convincing them that these enemies are in the right, fighting and suffering to prevent the overthrow of liberty, standing up against wickedness and cruelty, what must he have thought of his audience? What else but the legitimate result of his argument can we impute fairly as the object of his hopes? To whatever extent they believe him, they must be poor, dumb dogs not to rally, and rally at once, for the overthrow of their own government, and for the support of those who make war upon it. But he did not leave it to be inferred. He declared it to be a war for the enslavement of the whites and *the freedom of the blacks*. Which of the two was, in his opinion, the greater outrage, he does not appear to have stated. It is one of the unmistakable marks of the insurrection, by which it can always be identified, that its declarations for liberty are for a selfish and brutal liberty, which includes the liberty of injuring or disregarding others. If his white audience were not willing to be enslaved, that is to say, not willing to endure the last and most degrading outrage possible to be inflicted on human nature, they must, so far as they believed him, resist their own government. If he himself believed what he said, he must take up arms to resist the government, or stand a confessed poltroon. A public man, who believes that his government is guilty of the crimes he imputed, and will not take up arms against it, is guilty of unspeakable baseness. If his audience believed what he told them, they must have looked upon advice not to take up arms as insincere or contemptible. No public man, no private man, can make such charges and decently claim not to mean war. All

insurrections have their pretexts. The man who furnishes these is more guilty than the man who believes them and acts on them. If the statements of Vallandigham were true, the pretexts were ample, not merely as pretexts, but as justification of insurrection. They were more: they were incitements which it would be disgraceful to resist, and which human nature generally has no power to resist. The place where such things are done is the place of insurrection, or there is not and can not be a place of insurrection anywhere. If these laboratories of treason are to be kept in full blast, they will manufacture traitors faster than our armies can kill them. This cruel process finds no shelter under the plea of political discussion. Whatever might be said about ballots and elections, the legal inference is that it is intended to produce the results which would naturally flow from it. If the President, with all the army and navy, and his "minions," is at work to overthrow liberty and enslave the whites, every good man must fear to see that army victorious, and hail its disasters with joy. Every good man must strike to save himself from slavery now while he can. The elections are far off, and may be too late. It can not be claimed that the motive was to influence elections, because the argument does not fit that motive. It fits to insurrection, and that only. He pronounced General Orders No. 38 to be a base usurpation, and invited his hearers to resist it. How resist it? How could they resist it, unless by doing what the order forbade to be done?

What was there to be complained of except by persons wishing to do, or to have done by others, the acts by that order prohibited? He invited to resist the order. The order thus to be resisted, prohibited the following acts, viz.: Acts for the benefit of the enemies of our country, such as carrying of secret mails; writing letters sent by secret mails; secret recruiting of soldiers for the enemy inside our lines; entering into agreements to pass our lines for the purpose of joining the enemy; the being concealed within our lines while in the service of the enemy; being improperly within our lines by persons who could give private information to the enemy; the harboring, protecting, concealing, feeding, clothing, or in any way aiding the enemies

of our country; the habit of declaring sympathies for the enemy; treason. These are the things prohibited in Order No. 38, which Mr. Vallandigham invited his audience to resist. "The sooner," he told them, "the people inform the minions of usurped power that they will not submit to such restrictions on their liberties, the better." The "minions" here referred to were the commanding General of the Department and others charged with official duties under their own government. The "liberties" not allowed to be restricted were liberties to aid the enemies of the United States. He declared his own purpose to do what he could to defeat the attempt now being made to build up a monarchy upon the ruins of our free government. This resistance could mean nothing but resistance to his own government, which he had before declared to be making attempts to enslave the whites. These appeals to that large public meeting are charged to have been made "*for the purpose of weakening the power of his own government in its efforts to suppress an unlawful rebellion*," all of which opinions and sentiments "*he well knew did aid, comfort, and encourage those in arms against the government*, and could but induce in his hearers a distrust of their own government, and sympathy for those in arms against it, *and a disposition to resist the laws of the land.*"

Not one syllable of all this is denied, and yet the arrest is complained of as unconstitutional.

It must be so apparent as to need no further demonstration, that an arrest of some kind had become necessary for the preservation of public decency. Either General Burnside and his soldiers should have been arrested, or Vallandigham. The only open question is, which was the proper party, and whether a mistake was made as to the man. If Vallandigham was right, General Burnside and every other officer of the army, or navy, every member of the Cabinet, even the President himself, should be forthwith put under arrest. The Federal Congress, which voted supplies for the army engaged in such a foray on the rights and interests of mankind, ought to be promptly dispersed. On the other hand, if the President and Congress, and the Government of the United States are not all criminals, if our Gen-

erals and soldiers are not all minions and pimps of a wicked scheme to enslave the people, Vallandigham ought to have been arrested. The acts which General Burnside was sent here to perform, and the acts of Vallandigham, considered as separate acts, or as lines of action, could not possibly go on together. They were, in their essence and nature, incompatible things, and mutually destructive of each other. If General Burnside might have arrested Jefferson Davis, and held him a prisoner, why not Clement L. Vallandigham? If we suppose the Constitution was intended to authorize two such incompatible and mutually destructive lines of action at the same time, we impute an incredible absurdity. If it authorizes the drafting of one part of the population, the organizing of armies, and marching to battle to suppress insurrection, it can not at the same time authorize the other part of the population to thwart, defeat, and annul their efforts. On the other hand, if it authorize a portion of the people to attack, and resist, and discredit the government, it can not require the other portion to make war to defeat them. If the object of the Constitution was to provide for its own destruction and protect its enemies, the arrest of Vallandigham was a mistake: Burnside was the man. But if the object was to provide for the safety of the Constitution, and protect its friends, no mistake has been made. Vallandigham is the man to be arrested. It never could have been intended to allow them both to take the field at the same time.

It is claimed that, since Vallandigham was not a military man, this arrest should have been made by the civil authorities. I understand the argument of learned counsel to be placed on this ground. Beyond or in addition to the ordinary arrests by civil process, none other are allowed under the Constitution, except such as are authorized by military law. Military law, he shows us, consists chiefly in the Rules and Articles of War, and applies only to persons engaged in the military service of the Government. The objection, therefore, is not one which relates to time, place, or circumstance. It denies authority to make such arrests at any time, in any place, or under any circumstances. I am not aware that language can state it more broadly than it was stated

by learned counsel. Any arrest or capture made by the army, of persons not in the military service, or so connected with it as to be subject to the rules of military law, is, he argues, an unlawful arrest. All such arrests must be discharged on Habeas Corpus, unless it happen that Habeas Corpus has been suspended. A state of war, civil or other, does not, of itself, he thinks, suspend Habeas Corpus. It is a part of his theory that Habeas Corpus has not yet been suspended.

The unavoidable result of this argument is, if it be the law, that no prisoner has been taken during the war, who could not have had his discharge on Habeas Corpus. The prisoners taken by General Burnside at Roanoke Island, and by General Grant at Fort Donelson, were dischargeable on Habeas Corpus. General Banks can make no such arrests in Louisiana; Rosecrans none in Tennessee; Grant none in Mississippi; Hooker none in Virginia; Hunter none in South Carolina. Most of the prisoners seized by these Generals are citizens of the United States, not engaged in the military or naval service thereof, nor called into actual service as a part of the militia. They could copy the form of the present petition, and conscientiously make oath to every material fact stated in it. It may be said that in those cases the prisoners taken were taken in the act of war, *flagrante delicto*. But if there was no authority to take them, under any circumstances, the fact supposed can make no difference. In order to rest a distinction on the fact of flagrant war, where it exists, it must be admitted that in some cases the authority does exist, which being admitted, the whole proposition goes into collapse and disappears. The inquiry then comes down to an inquiry as to time, place, and circumstance, which is a very distinct and different inquiry.

In truth, however, much of the supposed difference in circumstances does not exist. As Generals commanding different armies of the United States, all in the field for purposes of war, and engaged in actual war, the authority conferred on them by the Constitution must be the same. One may be limited by special instructions, another not; but without reference to such limitation, their general authority and duties as Generals must

be equal. The exigencies of war may press sometimes more heavily on one, sometimes on another. But if this is allowed to make a difference in the general authority exercised, the question is reduced to a question of circumstances, which learned counsel by no means admits. Nor does his proposition allow of an exception, if it happen anywhere that the civil administration, and the judiciary as a part of it, be forcibly obstructed and overthrown. This again would reduce it to a question of circumstances. His argument is that this kind of arrest is absolutely forbidden by the Constitution; and being so forbidden, of course no circumstance can make it lawful. The denial is far-reaching and fundamental.

It follows, as a necessary corollary from the proposition, that, if at any time, in any part of the United States, an insurrection can make so much head as to obstruct or overthrow civil administration, it will have gained impunity. If those engaged in it may not be arrested by the army sent against it, they may not be shot. If they can not be persuaded, nothing can be done. The application of restraint is imprisonment; and unless military imprisonment be allowed, no imprisonment can take place. For in the case supposed, the civil administration is no longer practicable. It may be said that in such instances Habeas Corpus must be suspended. This does not meet the argument. We are inquiring what arrests may be lawfully made. Suspension of Habeas Corpus makes no arrest lawful which was before unlawful. It merely suspends one remedy for unlawful arrests. It does not necessarily suspend other remedies, such as actions for false imprisonment and trespass. These are usually provided for by acts of indemnity which are not needed for lawful arrests. In England, these acts of indemnity may be passed by Parliament *after* the war is over; for there is no constitutional prohibition against *ex post facto* laws. But here an indemnity act must pass *before* the imprisonment, to be available as an indemnity. The question now under consideration is, what acts are lawful and need no indemnity? What need can there be to suspend Habeas Corpus, when the civil tribunals, which alone should issue such writs, are already overthrown? The question is, whether every act of bat-

tle or of war by our soldiers against an insurrectionary force, is a civil trespass, and needs an act of indemnity? For if our soldiers may kill their enemies, they may capture them. Reduced to its last analysis, it is a question whether it is lawful, by force, to put down an unlawful and forcible opposition to the civil authorities; whether it is an unconstitutional act to enforce the Constitution. If the gentleman's proposition be true, must it not be also true that every forcible attempt to overthrow the Constitution has the guarantee of that instrument to protect it from harm and insure its success. It is attacked by force, and its friends may not strike without committing trespass.

Let us examine the grounds on which he founds his proposition. He cites several well-known provisions of the Constitution: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed." . . "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." . . . "No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation;" and some others.

These are parts of the Constitution, very valuable parts, but not the only ones. If the Constitution had provided no means of enforcing the rights here mentioned it would have been very ineffectual to secure them. Its guarantees of these rights might or might not have been worth the paper on which they were written. The argument of learned counsel leaves the Constitu-

tion precisely where the framers of it would have left it, if they had put in it no other clauses but these. I ask him what is to be done if it happen that by civil war the courts are overthrown, juries dispersed, and, in the State where the crime was committed, all civil administration is rendered impossible? I ask him what is to be done if it happen that throughout any large portion of the United States the Constitution, and all the officers under it, all its recognized legal processes and tribunals, be forcibly overcome and defied; and if those claiming the protection of the Constitution are, by unlawful violence there, *not* allowed to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures? What if the enemies of the Constitution, in arms against its authority, *do* attack and seize its friends without probable cause, without charges upon oath, and without warrant? What if they *do* deprive them of life, liberty, or property without due process of law, and take private property for public use without due compensation? In a word, what if the enemies of the Constitution suppress, expel, or demolish every vestige of constitutional administration, and substitute therefor war—war by large armies, war by small bands, war by individual assassinations, hatreds, revenges, physical force, war everywhere, so that not one shred or patch of the Constitution remains in that whole region? The question to be answered here is, what is to be done in such a state of affairs? I have listened to the argument of my learned friend with respectful attention. I have wandered with him over many fine fields of declamation, all about liberty and the Constitution, but I find no answer.

Unfortunately the condition of the country urgently requires an answer. I find that answer in other parts of the Constitution. The instrument would have been nugatory, an idle and perhaps cheerful composition, but wholly unworthy of its framers, if it could furnish no answer. If it could furnish no answer, we should find ourselves involved in a situation unprovided for, never contemplated as possible, and one which would be a law unto itself. Being without law for the situation, we should rightfully act upon the necessity before us. But my argument

is that the Constitution does provide an answer—a well-expressed and adequate answer. That answer, in substance, is, to meet war with war. I refuse to be dazzled by glittering fragments of a broken Constitution, or to follow their illusory lights into a bottomless bog of anarchy. On behalf of the people I demand the whole Constitution. On that rock we found our liberty, and the gates of hell shall not prevail against it.

It is not necessary to repeat here the numerous passages of the Constitution intended to establish justice and secure liberty. They do not purport to create, but to guard and secure. Justice existed before, but the concern of the framers of the Constitution was to "establish" it. Domestic tranquillity was an object of general desire, yet government was needed to "insure" it. The common defense might be, indeed, had been, conducted by them successfully without a constitution, but they deemed it expedient to "provide" for it. Liberty had been, by them, successfully asserted, but they felt the necessity of a government to "secure" its blessings. Therefore they did "ordain and establish this Constitution of the United States of America." Its framers understood perfectly that, without it, liberty might exist, but it would have no establishment or security. They would have wasted their many weary years with profitless endeavor, to behold, at last, the object of desire "speed away on cherub pinions—the guide of homeless winds and playmate of the waves."

How, then, did they secure liberty?

In the order of securities we find, first, certain declaratory clauses. It is one step toward establishing and securing rights to agree upon them and declare them. The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States. Private property shall not be taken for public use without due compensation. No person shall be deprived of life, liberty, or property without due process of law, and other clauses before quoted. It is observable that in these declarations are embraced rights of a different grade—rights called absolute and indefeasible, and rights merely conventional or secondary. But they are all declared with the

same solemnity, and secured by the same guarantees. Materials of different degrees of solidity and costliness were fitted to their respective places in the edifice. The whole structure was necessary for the purpose contemplated, and all its parts and details were necessary to the structure. They do not tell us which of them could be taken away without danger to all.

It was necessary to go further and provide for the enforcement of these declarations. The first step was to provide for electing a chief executive officer, to preside over and enforce the laws. Without him the whole machinery would fail. Except in the manner there provided, there can be no President elected. But an election of President implies other things. When elected, he is to perform duties and exercise his faculties. Another practical security is provided by ordaining the election of a legislative body, and prescribing its functions, and declaring "That this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." But, further than this, the Constitution provides for courts, judges, and marshals, to adjudicate and enforce the laws. It does not stop there. In all ages of the world men have been found not obedient to judicial decisions; sometimes numerous and strong enough to overthrow and defy all the processes of civil administration. The Constitution does not fail to provide for such an emergency. It crowns the guarantees before offered by providing for an adequate physical force to overcome all opposition. It speaks of a well-regulated militia as necessary for the security of a free state. It provides authority to "raise and support armies, to provide and maintain a navy, and to declare war." It provides for organizing, arming, and disciplining the militia; for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions. It makes the President "commander-in-chief of the army and navy of the United

States, and of the militia of the several States when called into the actual service of the United States." Thus placing at his disposal the entire resources of the country, it requires of him, before entering upon his office, to invoke the sanction of Almighty God, and clothe himself with an oath: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

The President is no longer a free man in the chimerical sense of freedom which we hear so much of. But he is not less free than other citizens, who are all bound to support the Constitution. It is not one of the liberties secured by the Constitution, to select some particular right there guaranteed, to maintain it as distinct from and in opposition to the rest, or to hold fast to that one and let go the rest. Each holds his rights upon one ineradicable condition, that he shall, to the extent of his ability, maintain and defend every part of the Constitution. He can not throw off his allegiance, defy the government, make war upon it, and, at the same time, claim its protection. When he lifts his arm against the Constitution, the arm may be cut off without giving him a right to complain of cruel and unusual punishments. When he lifts his voice against the liberties of his countrymen, his voice may be silenced in the interests of freedom of speech. When he arms himself to assail the defenders of the Constitution, those arms may be taken from him in the interest of the general right to bear arms. When he makes of his house a shelter for traitors, and barricades it from the approach of patriots, it may be broken open and searched in the general interest of freedom from unreasonable searches and seizures.

In the civil administration different remedies are applied, each after its kind. A writ of capias seizes the body, but it does not violate the constitutional guarantees of personal liberty; an attachment lays hold of goods, but does not violate property rights; a replevin breaks open houses, but does not

conflict with the right to be protected from unreasonable searches and seizures. The common law furnishes redress in some instances; equity in others; maritime law in others. Each of these is so far exclusive as, when properly appealed to, not to be interfered with by any other; and, while in progress, to be governed exclusively by its own rules. War is the last resort, but when properly appealed to, its processes are due and reasonable processes, and, like the rest, must be allowed to work out results exclusively by its own rules.

"The body of a nation can not, then, abandon a province, a town, or even a single individual who is part of it, unless compelled to it by necessity, or indispensably obliged to it by the strongest reasons, founded on the public safety.

"Since, then, a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation. For the law of nations gives us a right to every thing without which we can not fulfill our obligation; otherwise it would oblige us to do impossibilities, or rather, would contradict itself in prescribing us a duty, and, at the same time, debarring us of the only means of fulfilling it." . . .

"*A nation or State has a right to every thing that can help to ward off imminent danger, and keep at a distance whatever is capable of causing its ruin, and that from the very same reasons that establish its right to the things necessary to its preservation.*" (Vattel's Law of Nations, 5, 6.)

The right of nations here described has been fully preserved to the United States by their Constitution, so far as the question under debate is affected. The power to make war is given without limitations. So far as war may be a means of preservation, or for warding off imminent danger, and keeping at a distance whatever is capable of causing its ruin, the nation is safe. The rights of war are as sacredly guaranteed as trial by jury, or personal liberty, or any other right whatever. The President can not claim to have preserved, protected, and defended the Constitution, TO THE BEST OF HIS ABILITY, until he shall have used all the ability given him by the utmost rights of war. He who declares he is willing to support the war, provided it creates

no disturbance, only declares he is willing to support it, provided it shall be so conducted as to be really something else, and not war.

The Constitution does not define the meaning of Habeas Corpus, or trial by jury, or liberty, or war. They were to be ascertained elsewhere. I have before shown a definition of civil liberty. One of its conditions is an abridgment of natural liberty. Liberty was not abridged of the right to call in war to her defense, but she could not be endowed with a capacity for impossibilities. She could not require of human nature that which would be impossible to God himself, repose and commotion, peace and war at the same time. War could do little for Liberty, if she should hang forever sobbing on his neck, pinioning his arms, and holding him back from being War indeed. No! in this solemn time of domestic sorrow and of public peril, it is little better than sacrilege thus to potter with the meaning of words. By liberty was intended such liberty as was possible to mankind. By war was intended not a hollow pretext of war, but a lifting high of the red right hand of avenging justice. A thorough, condign, effectual laying hold of enemies; a summary breaking-up of their hiding places, and a terrifying, deathly pursuit, until they shall cease to exist, or cease to be enemies.

In Scott's Military Dictionary, a recent work, which, he says, was not prepared in view of existing disturbances, he states the following rule, p. 273:

"With regard to the requisition of military aid by the civil magistrate, the rule seems to be that when once the magistrate has charged the military officer with the duty of suppressing a riot, the execution of that duty is wholly confided to the judgment and skill of the military officer, *who thenceforward acts independently of the magistrate until the service required is fully performed.* The magistrate can not dictate to the officer the mode of executing the duty; and an officer would desert his duty if he submitted to receive any such orders from the magistrate. Neither is it necessary for the magistrate to accompany the officer in the execution of his duty. The learning on these points may be gathered from the charge of Mr. Justice Little-

dale, to the jury, in the trial of the Mayor of Bristol for breach of duty in not suppressing the riots at that city in 1831."

I have spoken of military law, which is claimed, by learned counsel on the other side, to be a law for military men. This law is often mistaken for or confounded with martial law, but the terms are very far from convertible. Martial law is often defined as no law at all; but this definition is rather an objurgation against than a description of it. I venture to define martial law to be the rule of action adopted by all nations, and at all periods of the world, by which, in times of war, to guard against dangers that often arise, and by reason of the necessity of it, such discretion is given to the military commander, measured by the requirements of the situation, as shall insure to his force the best chances of success. It is that established practice, that common law of nations, by which, under the compulsion of right reason, when they have called an army into the field for war, and confided to it the safety of the commonwealth, they allow it, without hinderance or interruption, to perform its work.

Counsel for petitioner reads to us many authorities to show that military law applies only to military men. Beyond this his argument is comprised either in a broad denial that *martial law* means any thing more than is intended by *military law*; or, if it does, an equally broad denial that it does or can exist in Great Britain or the United States. His limitation of the *military law*, so called, appears to me rather more narrow than the authorities justify; but for the purposes of this argument, I have no controversy with him there. Let him take for granted all that I understand him to claim, as to the rule concerning *military law*. The questions remain whether martial law or the laws of war, or the rights of war — phrases interchangeably used by the Supreme Court of the United States, in discussing the theme, and by writers — mean more than military law; and if they mean more, whether they can exist in Great Britain or the United States. On both these questions counsel for petitioner takes the negative. If I can show him to be wrong here,

I shall have defeated his whole argument. For, although his argument is not confined to these inquiries, all other parts of it depend upon them.

I have already cited Vattel to show that the same rules or laws of war apply, or ought to apply, to civil as to foreign war. The only doubt is, whether persons in insurrection against their own government, can rightfully claim the same treatment applied in mitigation of the rigors of war to foreign enemies. The most merciful rule is the one to which Vattel inclines for reasons of expediency and humanity. It is the rule applied by our own government in this war. It is quite unnecessary to cite authorities to show that in foreign war the authority of a General is not limited to the military force under his command. During the Peninsular war, Wellington governed Spain and Portugal, and afterward a part of France, in the exercise of well-known and commonly-acknowledged rights of war. In our war with Mexico General Scott promulgated and enforced a plan for the government of Mexico. Some debate was raised at home whether the Constitution conferred so much power on a General. It was acquiesced in and approved. There could be no doubt of the authority to make war, and this was a necessary incident. Under the same rule Rosecrans controls civil administration in Tennessee, and Banks in Louisiana, and Curtis did in Missouri. Doubtless persons captured in flagrant acts of treason may be hung. As the greater includes the less, the right to hang implies the right to inflict lesser evil. They are, therefore, allowed to be treated as prisoners of war. I am now speaking of the existence of rights of war, laws of war, or martial law, and showing them not to be limited to military men, and to be much more comprehensive than *military law*—indeed, entirely distinct and different from it. I am not now making the application to Vallandigham. That is a question of circumstances. I am replying to the argument which denies the existence or application of such a law under any circumstances.

To maintain his denials counsel cites many English authorities—among them Sir Matthew Hale—and he claims, as the result of those authorities, that martial law has been definitively

abandoned and prohibited in England. These authorities do, some of them, show that certain gross abuses, which were practiced by the Stuarts in England, under the pretext and name of martial law, but which found as little justification under martial law as under any other, have been prohibited. Perhaps he could show, with smaller research, that measures have been taken to prevent a repetition of the infamous and bloody assizes of Jefferies; but this would not go very far to discredit trial by jury. Trial by jury yet exists in England; and martial law is applied there as often as occasion requires. If any thing may be fairly assailed by holding it responsible for abuses, the judiciary would be one of the first institutions of government to fall. Looking over the history of past ages, it is apparent that military men would have some difficulty in establishing a claim to a leadership in the abuses inflicted on mankind. Most of the historical struggles for liberty have resulted from a real and natural antagonism between peoples and their rulers; rulers claiming, by some heritable superiority, to govern, and people feeling the government mainly in its oppressions. Whether judges or military men are most responsible for the cruelties inflicted in such struggles may be doubted. From a somewhat patient reading of law-books, I am, however, prepared to admit that judges have felt much less alarm and indignation at stretches of power practiced by themselves, than they have felt at the assumption of undue power by military men. If there were no history except what we find in law-books, judges would have a decided advantage over Generals. There are, also, specimens of popular forensic eloquence, originally delivered as the voice of the people against despotic governments, (some of them quite out of hearing), which never lose their attractions. We rather like to hear them launched against our own government, that is to say, ourselves. The difficulty of playing both people and tyrant, at the same time, is scarcely appreciable in these popular amusements.

I am relieved from stating my own conclusions concerning the numerous English authorities cited, by finding an examination of them, and an opinion concerning them, by Mr. Attorney-General Cushing. (Opinions of Att'ys Gen'l U. S., vol. 8, p. 365.)

The Attorney-General, after remarking upon English authorities, sums up:

"*In fine, the common law authorities and commentators afford no clue to what martial law, as understood in England, really is; but much light is thrown upon the subject by debates in Parliament, and by facts in the executive action of government.*"

This is a report to his own government by one of the most learned and laborious Attorneys-General the United States ever had. He quotes Sir Matthew Hale, also:

"Martial law is not, in truth and reality, a law, but something indulged rather than allowed as a law: the necessity of government, order, discipline in the army, is that only which gives these laws a countenance." (Hist. Com. Law, p. 39.)

Mr. Attorney-General says:

"This proposition is a mere composite blunder, a total misapprehension of the matter. It confounds *martial law* and *law military:* it ascribes to the former the uses of the latter; it erroneously assumes that the government of a body of troops is a *necessity*, more than that of a body of civilians, or citizens. It confounds and confuses all the relations of the subject, and is an apt illustration of the incompleteness of the notions of the common-law jurists of England in regard to matters not comprehended in that limited branch of legal science."

"Even at a later day, in England, when some glimmerings of light on the subject began to appear, the nature of the martial law remained without accurate appreciation in Westminster Hall."

He cites the case of Grant *v.* Sir Charles Gould, (2 H. Blackstone, 98), decided by Lord Loughborough, who said: "The essence of martial law consists in its being a jurisdiction over all *military* persons, in all circumstances." And because military men are triable for many offenses, and have their personal rights, for the most part, regulated by law—"Therefore," he says, "it is totally inaccurate to state martial law as having any place whatever in the realm of Great Britain.'

Mr. Attorney-General says: "This is *totally inaccurate*," and explains why.

Mr. Attorney-General then quotes Stephens's commentaries, vol. 11, p. 602, note.

"Martial law," says Stephens, "may be defined as the law, whatever it may be, which is imposed by military power; and has no place in the institutions of this country, (England), unless the Articles of War, established under the acts just mentioned, be considered as of that character."

The Attorney-General proceeds:

"Here again is pitiable confusion; for the Articles of War are not a law 'imposed by the military power,' nor is martial law confined in its origin to the military power as the source of its existence."

The confusion among English lawyers, remarked by the Attorney-General, will account, probably, for some inconsistencies of *expression* among English statesmen on this subject, though the *action* of English statesmen is sufficiently clear and consistent. The question whether martial law has "a place in the realm of Great Britain," as denied by Lord Loughborough, or "a place in the institutions of England," as denied by Mr. Stephens, is purely a question of historical fact, and history is against them. Nor is the question open to doubt. Martial law, such as I claim, has been unquestionably adopted and enforced in Great Britain and her provinces as often as any occasion has been felt for it. I may here dismiss the English authorities.

Mr. Attorney-General Cushing, in his opinion, makes a most learned examination of the topic, and says:

"Looking into the legislation of other countries, we shall find all the legal relations of this subject thoroughly explained, so as to furnish to us ideas at least, if not analogies, by means of which to appreciate some of its legal relations in the United States."

These legal relations appear to be better defined in France than elsewhere. Three conditions or states are there provided

for. 1. Peace. In the state of peace, all military men are subject to the law military, *leaving the civil authority untouched*, in its own sphere, to govern all persons, whether civil or military, in class. 2. The state of war. When it exists, the military authority *may have to take precedence of the civil authority, which, nevertheless, is not deprived of its ordinary attributes, but, in order to exercise them, must, of necessity, enter into concert with the military commander.* 3. The state of siege. When it exists, all the local authority passes to the military commander, who exercises it in his own person, or delegates it, if he please, to the civil magistrates, to be exercised by them under his orders. The civil law is suspended for the time being, or, at least, made subordinate, and its place is taken by martial law, under the supreme, if not direct administration of the military power. "*The state of siege may exist in a city, or in a district of country, either by reason of the same being actually besieged or invested by a hostile force, or by reason of domestic insurrection.*"

Of these different stages, Mr. Cushing concludes, the state of siege is equivalent to the proclamation of martial law in England and the United States.

I remark upon this, that these distinctions, after all, between a state of war and a state of siege, are not very valuable. Martial law is a thing of necessity, and is limited by the necessity, so that the less urgent the necessity, the less extensive the power. It places in the hands of the General a discretion, as discretion is placed sometimes in the hands of judges and chancellors. It is said that martial law is no law; and it is said that equity is the length of the chancellor's foot. But the chancellor, like the General, is required to exercise a "sound discretion," a "reasonable discretion," a "wise discretion, in view of all the circumstances."

The New American Cyclopedia says:

"Martial law is often confounded with military law; but these terms are by no means convertible." Speaking of martial law, it says: "It proceeds directly from the military power which has now become supreme. Yet, remotely and indirectly, martial law expresses the will of the people."

"Martial law has often been confounded with military law, but the two are very different. Military law, with us, consists of the 'Rules and Articles of War,' and other statutory provisions for the government of military persons, to which may be added the unwritten or common law of the 'usage and custom of military service.' It exists equally in peace and in war, and is as fixed and definite in its provisions as the admiralty, ecclesiastical, or any other branch of law, and is equally, with them, a part of the general law of the land. But, in the words of Chancellor Kent, 'martial law is quite a distinct thing.' It exists only in the time of war, and originates in military necessity. It derives no authority from the civil law (using the term in its more general sense), nor assistance from the civil tribunals, for it overrules, suspends, and replaces both. It is, from its very nature, an arbitrary power, and 'extends to all the inhabitants (whether civil or military) of the district where it is in force.' It has been used in all countries, and by all governments, and it is as necessary to the sovereignty of a state as the power to declare and make war. The right to declare, apply, and enforce martial law, is one of the sovereign powers, and resides in the governing authority of the state, and it depends upon the constitution of the state whether restrictions and rules are to be adopted for its application, or whether it is to be exercised according to the exigencies which call it into existence. But even when left unrestricted by constitutional or statutory law, like the power of a civil court to punish contempts, it must be exercised with due moderation and justice; and, as 'paramount necessity' alone can call it into existence, so must its exercise be limited to such times and places as this necessity may require; and, moreover, it must be governed by the rules of general public law, as applied to a state of war. It, therefore, can not be despotically or arbitrarily exercised, any more than any other belligerent right can be so exercised." (Cushing, Opinions of U. S. Att'ys Gen'l, vol. 8, pp. 365, et. seq.; Wolfius, Jus Gentium, sec. 863; Grotius, De Jur. Bel. ac Pac., lib. 2, cap. 8; Kluber, Droit des Gens, sec. 255; O'Brien, American Military Law, p. 28.) (International Law and Laws of War. Halleck, 373.)

"Martial *law*, then, is that military rule and authority which exists in time of war, and is conferred by the laws of war, in relation to persons and things, under and within the scope of active military operations in carrying on the war, and which extinguishes or suspends civil rights, and the remedies founded upon them, for the time being,

so far as it may appear to be necessary in order to the full accomplishment of the purpose of the war—the party who exercises it being liable in an action for any abuse of the authority thus conferred. It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military law or military action." (Benet's Military Law and Courts-martial, 14.)

"We remark, in conclusion, that the right to declare, apply, and exercise martial law is one of the rights of sovereignty, and is as essential to the existence of a state as is the right to declare or carry on war. It is one of the incidents of war; and, like the power to take human life in battle, results directly and immediately from the fact that war legally exists. It is a power inherent in every government, and must be regarded and recognized by all other governments; but the question of the authority of any particular functionary to exercise this power, is a matter to be determined by local and not by international law. Like a declaration of a siege or blockade, the power of the officer who makes it is to be presumed until disavowed, and neutrals who attempt to act in derogation of that authority, do so at their peril." (International Law and Laws of War. Halleck, 380.)

"The English common law authorities and commentators generally confound *martial* with *military* law, and, consequently, throw very little light upon the subject, considered as a domestic fact; and in parliamentary debates, it has usually been discussed as a *fact*, rather than as forming any part of their system of jurisprudence. Nevertheless, there are numerous instances in which martial law has been declared and enforced, in time of rebellion or insurrection, not only in India and British colonial possessions, but also in England and Ireland. It seems that no act of Parliament is required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which called it forth are at an end, in order to give constitutional existence to the *fact* of martial law." (*Id.*, *Ib.* 374.)

I will now ask attention to two cases discussed in the Supreme Court of the United States, which give the sanction of that Court to the doctrine I am endeavoring to sustain.

The Constitution provides that private property shall not be taken for public use without due compensation. Yet a General, going to war, could not post his sentinels without committing what would be, in peace, a trespass. Every mile of his march, with ordinary military precautions, every encampment, would be a violation of law. In Mitchell *v.* Harmony, 13 How. 115, the plaintiff below had sued an officer of the army of the United States for taking his property during the war with Mexico. It was taken on error to the Supreme Court of the United States, on exceptions to the charge of the Circuit Judge to the jury. Chief-Justice Taney said, p. 133:

"Upon these two grounds of defense the Circuit Court instructed the jury that the defendant might lawfully take possession of the goods of the plaintiff to prevent them from falling into the hands of the public enemy; but in order to justify the seizure, the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public uses and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise."

The charge, as thus stated, was sustained. Again, on page 134, the Chief-Justice said:

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed, to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service, or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; *but the officer is not a trespasser.*" . . . "It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified. *In deciding upon this necessity, however, the state of the facts, as they appeared to the officer, at the time he acted, must govern the decision; for he must necessarily act upon the information of others, as well as his own observation.*"

Mr. Justice Daniel delivered a dissenting opinion on other points. But on this point he said, p. 139:

"The principle itself, if properly applied, of the right to take property to prevent it from falling into the hands of the enemy, is undisputed."

And again, same page:

"I have no doubt of the right of a military officer, in a case of extreme necessity, for the safety of the government or army, to take private property for the public service."

Again, p. 140:

"*The safety of the country is paramount, and the rights of the individual must yield in case of extreme necessity.*"

Observe that this is not placed on the ground that, in extreme necessity, the Constitution is suspended, and the laws properly broken; but it is held to be a lawful act. They do not look upon it as trespass, excusable from great urgency, but they declare it not to be a trespass. The officer is clothed with a lawful right to do it. But this property right is guarded by the same sanctions in the Constitution with the right of personal liberty. Inasmuch as a *person* may give the enemy more help, or expose our own army to greater dangers than *property* could, the reason is more cogent when applied to persons.

During the celebrated Dorr rebellion, the Legislature of Rhode Island passed an act declaring the State under martial law. One Martin Luther being charged with aiding and abetting the rebellion, his house was broken open and entered, and he was arrested, or, in the language of the petition in this case, he was "seized by overpowering numbers." He brought an action against the parties who made the arrest, in trespass *quare clausum fregit*. They justified under the statute declaring martial law. It appears that there was not, in that case, more than in this, "any warrant issued upon probable cause, supported by oath or affirmation." In that action martial law, as a topic, came under discussion in the Supreme Court of the United States. (Luther *v.* Borden *et al.*, 7 H. 1.) Chief-Justice Taney delivered the opinion

of the Court, from which I shall presently read. But before doing so, I propose to read from the dissenting opinion of Mr. Justice Woodbury, and to invite the attention of learned counsel on the other side to his descriptions of martial law, and the distinction he makes between what is called military law and martial law. It will appear that Mr. Justice Woodbury entertained an antipathy to martial law, at least, as vehement as that of counsel on the other side. The kind of martial law then under discussion, and which was sanctioned by the Court, well appears in his opinion. I shall read some passages showing that, with all his antipathy for military power, he did admit the propriety of an occasional exercise of military authority, precisely such as I say is authorized by martial law, and under precisely such circumstances. The difference between his position and the one which I am endeavoring to maintain, is this: He considers the exercise of the power in question to be meritorious, and deserving the gratitude of the country, but a breach of the law. I am endeavoring to maintain that it is in accordance with law. His Honor quotes the language of the Rhode Island statute, declaring martial law to be in force over the entire State, and on page 59 says:

"Now the words martial law, as here used, can not be construed in any other than their legal sense, long known and recognized in legal precedents as well as political history. (See it in Hallam's Const. Hist. ch. —, p. 258. 1 MacArthur on Courts-martial, 33.) The legislature evidently meant to be understood in that sense by using words of such well-settled construction, without any limit or qualification, and covering the whole State with its influence, under a supposed exigency and justification for such an unusual course. I do not understand this to be directly combated in the opinion just delivered by the Chief-Justice."

He then declares it to be manifest that it meant the ancient martial law "often used before the Petition of Right, and sometimes since." He adverts to the fact that defendants do not aver the existence of any civil precept, which they were aiding civil officers to execute, but set up merely military orders under

martial law. The dissenting opinion then argues that this did not mean merely a suspension of Habeas Corpus, nor the military code used in the armies of the United States and England:

"For," said his Honor, "nothing is better settled than that military law applies only to the military, *but martial law is made here to apply to all.*"

Again, page 61:

"So it is a settled principle, even in England, that under the British Constitution the military law does, in no respect, either supersede or interfere with the civil law of the realm; and that the former is, in general, subordinate to the latter, (Tytler on Military Law, 36, 51), *while martial law overrides them all.*"

On page 62 his Honor gives us a lively description of martial law, such as was declared by the statute in Rhode Island, and such as "described in judicial as well as political history." The rhetoric of learned counsel on the other side has often excited my admiration; never more than in his opening argument, when he denounced martial law. But here is a passage from Judge Woodbury, written, probably, with more care, and, perhaps, with greater experience, which I hope to be pardoned for saying, is rather superior to any thing we had the pleasure of listening to this morning. It lacked only the fine voice and elocution of the advocate of Mr. Vallandigham to make it even more effective than any thing he uttered:

"It exposed," says Mr. Justice Woodbury, "the whole population, not only to be seized without warrant or oath, and their houses broken open and rifled, and this where the municipal law and its officers and courts remained undisturbed and able to punish all offenses, but to send prisoners, thus summarily arrested in a civil strife, to all the harsh pains and penalties of courts-martial, or extraordinary commission, and for all kinds of supposed offenses. By it every citizen, instead of reposing under the shield of known and fixed laws as to liberty, property, and life, exists with a rope round his neck, subject to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial."

After reading these animated and highly-wrought judicial statements of impressions of a military court, one feels an inclination, from motives of literary curiosity, to read some description, by an imaginative military man, of a Court of Chancery. The effect of subordinate and accidental circumstances on the imagination is notable. His Honor had been obviously affected by thoughts of a drum-head as one of the articles sometimes made use of at a military trial. They do not use drum-heads in the Supreme Court of the United States, having conveniences for writing of a more fixed and satisfactory nature. One would wish to see an equally vivid account, by some General, how his imagination was affected by sight of his Honor's long black gown, without hoops or tournure. The drum-head excited in his Honor's mind thoughts of a whole population, and especially peaceful citizens, each with a rope round his neck, waiting to be hung—hung to a lamp-post, and not only a lamp-post, but the nearest lamp-post. It is to be presumed that the thoughts suggested to a General by his Honor's wig and gown, might have been more maternal and far less suffocating. But it may be reckoned as certain that a military commander would have felt some shock or revulsion at hearing from that august tribunal, issuing solemnly forth from the blackness of an aged and collapsed gown, a judicial representation of martial law: not invoked as a shelter from imminent peril to the State, and used because nothing less summary could be availing, nor used in the interest of civil order, but as inexcusably obtruded upon a people enjoying the beatitudes of undisturbed peace, and who but for it would be "reposing under the shield of known and fixed laws as to liberty, property, and life." Such being the product of judicial reason in the highest civil tribunal, a General might turn back to his drum-head without a very deep conviction of its inferiority.

His Honor says, p. 64:

"It appears, also, that nobody has dared to exercise it, in war or peace, on the community at large, in England, for the last century and a half, unless specially enacted by Parliament in some great exi-

gency, and under various restrictions, and then under the theory not that it is consistent with bills of rights and constitutions, but that Parliament is omnipotent, and, for sufficient cause, may override and trample on them all temporarily."

"After the civil authorities have become prostrated in particular places, and the din of arms has reached the most advanced stages of intestine commotions, a Parliament, which alone furnishes the means of war—a Parliament unlimited in its powers—has, *in extremis*, on two or three occasions, ventured on martial law beyond the military," etc.

The question now under debate is, not who may declare martial law, but whether, in any emergency, it may be declared. Nevertheless, his Honor is under a mistake as to the fact. (See Hansard's Parl. His. 1801, vol. 35, pp. 1013, 1018, 1024.) In a debate in the House of Commons, in 1801, Lord Castlereagh said:

"I perfectly understand that the prerogative of the Crown authorizes those acting under its authority to exercise martial law. I maintain that it is a constitutional mode for the executive government to exercise martial law in the first instance, and to come to Parliament for indemnity afterward, and is preferable to applying to Parliament first. . . . . *The rebellion in Ireland broke out in May, 1798; the executive government published a proclamation of martial law wherever the rebellion existed, without any express law for that purpose.* They did it on the principle that they were authorized by the king's prerogative, provided they did not transgress the necessity of the case, and sure I am that nothing could have induced them to have departed from the strict constitutional system, but that they felt they must deny to a great part of the country the advantages of the civil law, unless it were incorporated with the martial law. The two systems, existing at the same time, led to such a conflict of jurisdiction it was impossible to give effect to others."

It was denied by others that the proclamation of martial law could rightfully be made by virtue of the king's prerogative. The fact, however, is beyond question: *it was made, and not by Parliament.*

His Honor, Judge Woodbury, p. 69, says:

"All our social usages and political education, as well as our constitutional checks, are the other way. It would be alarming enough here to sanction an unlimited power, exercised by legislators, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws; and the people a race above all others jealous of encroachments by those in power."

He nowhere drops the fallacy of regarding martial law as a substitute for civil law in time of peace and safety. He keeps up the illusion of constitutional checks and limitations standing unassailed, free from threatened overthrow, and needing no military support. On this halcyon scene he imagines to be thrust the sudden, unnecessary march of armies; he is startled at the vision of bayonets and the sound of military command. With equally cogent logic might he demonstrate the inappropriateness of snow in harvest. Through all this elaboration, there breaks upon him, at last, a dim consciousness of not having met the question. He rids himself of it by one dogmatic stroke, and hurries forward to lose himself again in a thicket of evasions. During this moment of consciousness, he says, p. 69:

"And it is far better that those persons should be without the protection of the ordinary laws of the land, who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to allow, beforehand, the whole frame of jurisprudence to be overturned, and every thing placed at the mercy of the bayonet."

Here, at last, is all the argument against martial law that is produced, either in this dissenting opinion, or elsewhere. *Multum in parvo.* The occasional necessity for extraordinary remedies is admitted. That it is a rule of action among men to resort to these remedies, when needed, is not denied. That those who, in cases of peril, perform these services are entitled to the gratitude of their country, and may properly look to it for indemnity, is not only conceded, but is urged as part of

the argument. If we may be grateful to those who, in an emergency, overturn the whole frame of jurisprudence, might we not be still more grateful to those who made a frame of jurisprudence which does not require, in an emergency, to be overturned? It is conceded that, in times of peril, the public safety is the supreme law. But it is argued that because this law might be perverted and abused, it should itself be considered a perversion and abuse; one which entitles the performer to the gratitude of his country. It is customary to erect monuments to those who are entitled to public gratitude. On the theory I am combating, the inscription should be, "*Sacred to the memory of a patriot, who earned the gratitude of his country by perverting and abusing its laws, and by overturning the whole frame of its jurisprudence.*" The argument presupposes that persons intrusted with government functions are so bad that, if allowed by law to do the act when necessary, they would be likely to do it when not necessary. To avoid this danger, they are to be considered so good as to be relied upon to overturn the government, if need be, in order to save it. There is so much danger that public men will violate the law under false pretexts, they are to be encouraged to violate it without any pretext. And such violation is to be considered a legitimate means of becoming public benefactors. Is it possible for absurdity to go further?

In the next paragraph, we find his Honor no more face to face with the question, but retired behind a screen:

> "No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them; or, in other words, appoint an unrestrained military dictator at the head of armed men."

Again and again, the question is not whether the laws may be dispensed with. It is whether the laws authorize, in certain situations, the performance of acts which, if performed, even against the law, would be titles to public gratitude. Why should we be always answered only by an absurd jingle of words—

about being "*lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts.*" Is it claimed that the tyrannical Stuarts were lawfully authorized to dispense with the laws? Or, if they were, did his Honor imagine that the fair administration and enforcement of a law is the same sort of thing, the same kind of tyranny, as dispensing with it? On his own theory, the Stuarts might have been entitled to public gratitude, if they had happened to overturn the law at the right time. The question is, whether, in great emergencies, the commander of the military force may be considered as lawfully intrusted with a discretion, limited and restrained strictly within the necessity of the occasion? In reply to this question, his Honor denies that there ought to be "an unrestrained military dictator at the head of armed men." He denies that authority exists to repeal, abolish, or suspend, the whole body of the laws. But if no tribunal or department in our government is authorized to overthrow or suspend the laws, are they authorized to allow others to overturn them? The question is, what may be done to save the laws from overthrow? The army and navy and militia are at the President's command, and his oath binds him "to the best of my ability."

On pages 75 and 82, his Honor refers to the different steps toward war powers, which precede the shock of war and the laws of war. And, on page 83, he says:

"The necessities of foreign war, it is conceded, sometimes impart great powers as to both things and persons. But they are modified by those necessities, and subjected to numerous regulations of national law and justice and humanity. . . . . *So may it be in some extreme stages of civil war. Among these, my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent,* UNDER ITS RIGHTS, AND ON PRINCIPLES OF NATIONAL LAW, for a commanding officer of troops, under the controlling government, to extend certain rights of war, not only over his camp, but its environs and the near field of his military operations. But no further nor wider. On this rested the justification of one of the great commanders of this country, and of the age, in a transaction so well known at New Orleans." . . . . "If matters in

this case had reached such a crisis, and had been so recognized by the government, or if such a state of things could and did exist as to warrant such a measure, independent of that government, and it was properly pleaded, *the defendants might, perhaps, be justified within those limits, and under such orders, in making search for an offender, or an opposing combatant, and, under some circumstances, in breaking into houses for his arrest.*"

I will restore the passage omitted at the place of the asterisks above: "But in civil strife, they (the rights of war) are not to extend beyond the place where insurrection exists. Nor to portions of the State remote from the scene of military operations. Nor after the resistance is over. Nor to persons not connected with it. Nor even within the same, can they extend to the person or property of citizens against whom no probable cause exists which may justify it. Nor to the property of any person without necessity or civil precept."

His Honor, at last, after all his reluctance, comes to a full admission of the legality of such arrests. The only condition is, time, place, circumstance. His Honor, however, substitutes a phrase. I have called it martial law. He calls it the rights of war. It is of no importance to my argument which phrase is used. The thing which he has been denouncing as an overthrow of all law, he at last admits to be lawful. He also places these personal arrests in the same category with military seizures of property, which that Court holds to be lawful.

I may now turn to the opinion of the Court as delivered by Chief-Justice Taney, p. 45:

"The remaining question," says the Chief-Justice, "is whether the defendants, acting under military orders, issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the Legislature declaring martial law, it is not necessary, in the case before us, to inquire to what extent, or under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of a State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government.

It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities, and, unquestionably, a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authority. *The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government.* The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force, and the declaration of martial law, we see no ground upon which this Court can question its authority. *It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.* And, in that state of things, the officers engaged in its military service might lawfully arrest any one who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection, and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. *Without power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it.* No more force, however, can be used than is necessary to accomplish the object. And if the power is used for purposes of oppression, or any injury willfully done to person or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable."

"We forbear to remark upon the cases referred to in the argument, in relation to the commissions anciently issued by the kings of England to commissioners to proceed against certain descriptions of persons, in certain places, by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the Petition of Right, in the reign of Charles the First. But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purposes of self-defense, when assailed by an armed force; and the cases and commentaries concerning these commissions can not, therefore, influence the construction of the Rhode

Island law, nor furnish any test of the lawfulness of the authority exercised by the government."

This decision does not determine in what branch of the government resides authority to declare martial law. But it recognizes martial law as a legitimate means of preserving the government in emergencies calling for it. It shows that the ground taken by counsel on the other side, that no such authority is lodged in any branch of the government, is untenable. On page 44, the Court replies to the same kind of argument we have heard here, of the danger of intrusting so much power to the President.

"It is said that this power of the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and, at the same time, equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition must be prompt or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against willful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must, therefore, be respected and enforced in its judicial tribunals." (7 H. 44.)

"Moreover, when a military force is called out to repel invasion or suppress a rebellion, it is not placed under the direction of the judiciary, but under that of the executive. Suppose the military force, legally and constitutionally called into service for the purposes indicated, should find it necessary, in the course of its military operations, to occupy a field or garden, or destroy trees, or houses, belonging to some private person, can a court, by injunction, restrain them from committing such waste? It can do so in time of peace, and if its powers are to continue in time of war, the judiciary, and not the executive, will command the army and navy. The taking or destroying

of private property, in such cases, is a military act, an act of war, and must be governed by the laws of war; it is not provided for by the laws of peace. In the same way, a person taken and held by the military forces, whether before, or in, or after a battle, or without any battle at all, is virtually a *prisoner of war*. No matter what his alleged offense, whether he is a rebel, a traitor, a spy, or an enemy in arms, he is to be held and punished according to the *laws of war*, for these have been substituted for the laws of peace. And for a person so taken and held by the military authority, a writ of Habeas Corpus can have no effect, because, in the words of the United States Supreme Court, 'the ordinary course of justice would be utterly unfit for such a crisis.'" (International Law and Laws of War. Halleck, 378.)

The same writer states circumstances in the history of this country, which your Honor will find it easy to verify. From this statement it appears that the practice, now complained of as strange and unprecedented, was commenced under the administration of Washington. Jefferson and Jackson are also implicated. When Vallandigham shoots his poisoned arrows at President Lincoln, if there should prove to be strength enough in the bow, the same aim will pierce a succession of illustrious defenders of liberty. Here is the statement:

"During the administration of President Washington, in the Pennsylvania 'Whisky Insurrection' of 1794 and 1795, the military authorities engaged in suppressing it disregarded the writs which were issued by the courts for the release of the prisoners who had been captured as insurgents. General Wilkinson, under the authority of President Jefferson, during the Burr Conspiracy of 1806, suspended the privilege of this writ, as against the Superior Court of New Orleans. General Jackson assumed the right to refuse obedience to the writ of Habeas Corpus, first in New Orleans, in 1814, as against the authority of Judge Hall, when the British army was approaching that city; and afterward, in Florida, as against the authority of Judge Fromentin."

May it please your Honor! I have spoken some words of praise of the character and services of General Burnside. I

can now be silent. The patriot who, in these times, can get himself abused for following in the footsteps of Washington, Jefferson, and Jackson, has triumphed over all need of my poor commendation. The wrath of his country's enemies has been made to praise him.

The authorities relied upon to show that the laws of war, or martial law, are not any more allowed in Great Britain, I have shown to be in error. The statements, though made by parties whom we might expect to be informed, and which have probably misled counsel on the other side, are shown by Mr. Cushing, Attorney-General under the late President Pierce, to have resulted from misapprehension and confusion of ideas. But this showing depends not on the authority alone of his name, strong as it may be. The errors referred to are so demonstrable to reason, and so utterly at variance with history, it is quite unnecessary to go into a further exposition concerning them. In the dissenting opinion of Judge Woodbury, which I have freely adverted to, he was misled into a similar statement: but he let into it a sufficient number of exceptions to correspond with all the occasions there have been in Great Britain for martial law within the last hundred years. He insisted, however, that they had no constitution, and such acts were only done by Parliament in virtue of its unlimited power. I must again say, that the question is not, who may do it, but can it be done? For the purpose of my argument it is sufficient if done by Parliament, but the fact is otherwise. The quotation from Hansard's Debates shows that once, at least, it has been done by the executive. I have no doubt the same is true in other instances. The important matter is, however, it has been done, both in Great Britain and this country, every time there has been occasion for it. It is a rule of action in both countries.

The misconception of terms and confusion of ideas among common lawyers, on this topic, are not confined to England. A much clearer perception is shown by American writers on the main question involved; but even Mr. Cushing and Mr. Halleck fall into error in some particulars. The relations of suspension

of Habeas Corpus to martial law are less well defined. They explain these to us in a jumble of words, which need more explanation than the facts sought to be explained. It has been the good fortune of Great Britain and the United States to experience so few occasions for the laws of war within their own borders, and those occasions have been of duration so brief, that a prompt and unflinching recognition and use of martial law, when the occasions have happened, is all that I need show. Peace turns attention to thoughts of peace. The judges, then, take *their* turn; and danger being over, they sometimes bite their thumbs at the Generals in a very affecting manner. We are told that acts of indemnity are passed in order to cover the illegality of the laws of war, as if a law could be illegal!

When lawyers and judges fall to using rigmarole, it is not common for politicians and pamphleteers to allow themselves to be outdone. In the passage quoted from Hansard, Lord Castlereagh is made to say:

"I maintain that it is a *constitutional mode* for the executive government to exercise martial law in the first instance, and to come to Parliament for indemnity afterward. . . . *They did it on the principle that they were authorized by the king's prerogative, provided they did not transgress the necessity of the case.*"

This call for indemnity is often said to signify that the act was unlawful. What indemnity could be needed for a lawful act? So, then, it would appear to be a constitutional mode to do the unconstitutional thing, intending presently to apologize for it. Mr. Grey (afterward Earl Grey) was not impressed with the clearness of this explanation. He says:

"It was better that the executive government should resort to what had been called (he thought not legally) its prerogative of proclaiming martial law. That was no prerogative of the Crown, but, rather, an act of power sanctioned by necessity, martial law being a suspension of the king's peace."

Here, then, is a blaze of light. It was better to resort to that which did not exist, to-wit: the prerogative. It was an act

of power "*sanctioned*" by necessity, "martial law being a suspension of the king's peace." This luminous expounder had arrived at the conclusion that in war peace must be considered as suspended. It did not, however, occur to him that it is war itself which suspends peace, and not the laws of war, which of necessity exist when war exists.

Our own writers follow in the same train. Mr. Attorney-General Cushing, in the opinion before quoted, says:

"*We have in Great Britain several recent examples of acts to give constitutional existence to the fact of martial law.*"

Mr. Halleck says:

"*It seems that no act of Parliament is required to precede such declaration, although it is usually followed by an act of indemnity, when the disturbances which called it forth are at an end, in order to give constitutional existence to the fact of martial law.*"

They are explaining the laws of England, and on this part of the topic relax their vigilance, repeating merely the incongruous failures which they find. Passing over the idea that Parliament can make a thing constitutional which is not—an absurdity—they are not boggled at the declaration that an act already gone by and ended, can be made *to have been* constitutional, which was at the time not so. On the theory thus furnished by Englishmen, and incautiously followed by some of our best writers, indemnity acts, if truly expressing their meaning, would read as follows: "*Whereas, certain acts have been done which are known to have been unconstitutional and illegal, therefore they were and are constitutional, legal acts.*" This is carrying the power of Parliament to a pitch compared with which Omnipotence is feeble.

If I may venture to suggest the explanation they were manifestly groping for, it is in the fact alluded to by Earl Grey: the king's peace is suspended. This suspension of peace being usually accompanied by more or fewer proclamatory documents, and these documents being the only part taken in war by judges

and legislators, they have mistaken the documents for the war. They have omitted to remember that a failure of documents would not change the fact of war. The war, and not the documents, suspends peace. Of this the writers are sufficiently aware in other parts of their discussion. Mr. Attorney-General Cushing says:

"*When martial law is proclaimed under circumstances of assumed necessity, the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact.*"

In this statement Mr. Halleck concurs. Indeed, nothing can be more obvious. Yet most of the antipathy and all the arguments I have met with, directed against martial law, are arguments against enforcing it during peace. In other words, they are arguments against inflicting the rigors of war under false pretexts. A part of the confusion is occasioned by speaking of martial law as if it were distinct and different from the laws of war, or rights of war. No one doubts that, when war exists, it is a thing of such a paramount and supreme nature that its laws must prevail. The existence of war is not a suspension of Habeas Corpus; but, for all arrests authorized by the laws of war, the answer that war exists, and that the arrest was made in accordance with its rules, is a lawful and sufficient answer to a Habeas Corpus. General Burnside has expressed it very well: "We are in a state of civil war, and an emergency is upon us which requires the operations of some power that moves more quickly than the civil. *There never was a war carried on successfully without the exercise of that power.*"

Indemnity acts are sufficiently accounted for without supposing them to be necessary as a legal justification for acts of war. They are commonly enacted in civil wars, in which the application of the rigors of war is startling to people long accustomed to peace and civil administration. A concurrence of all branches of government in any public acknowledgment of its necessity, either before or after the fact, can not fail to produce a valuable effect on the public mind. Such acts may, also, in England answer a good legal purpose. They may close the courts to

vicious and experimental litigation, by which persons engaged in the public service in time of war, might, on the return of peace, be ruined or compelled to flee their country. Counsel on the other side, I understood him to say, by instruction of his client, has, at some length, called our attention to the number and variety of civil actions, to which, on his theory, General Burnside has exposed himself, as well as all who acted under his orders. On his theory, no act of indemnity can shield our soldiers. The right he claims is a constitutional right, which legislation can not affect. On his theory, every act of war by our soldiers is a trespass, and no act of indemnity can reach them. Hard as the fortunes of soldiers may be in war, on his theory, peace will bring them no repose. Our poor country, defended by their valor, enriched by their blood, however grateful it may be, can only welcome them home to the embrace of bailiffs. We may ring bells, kindle bonfires, and pour out our hearts in thankfulness to God for returning peace, but the noble boys who won it for us must skulk in hiding-places, to dream only of writs and constables and the law's delays; certain that their danger in peace is in proportion to their valor in war, and that he only can be hopeful who can prove himself to have been useless. This is not an exaggeration, but a necessary, logical result of the doctrine advanced here on behalf of Mr. Vallandigham.

The proposition is that the right to personal liberty, freedom of speech, etc., are absolute, inalienable rights, guaranteed inflexibly by the Constitution, and not to be suspended in any emergency, nor made to yield to any public necessity. I repeat that the question argued by counsel on the other side is not a question under what circumstances these rights may be abridged, but he denies the legal possibility of such abridgment. These rights extend to all citizens—to persons subject to military duty as well as the rest. Yet the same Constitution which guarantees these inalienable rights, authorizes the making of war and the calling out of the militia. Pressed by this fact, counsel do not seek to deny that the liberty of the soldier is, for the time of his service, abridged. This is too palpable for denial. He

seeks, therefore, to get round it by reading from an English decision, to the effect that the soldier gives up his liberty by contract. This poor evasion does not apply to persons who are drafted against their will; but it is itself a denial that these rights are inalienable, for it speaks of alienating, by contract, an inalienable right.

The conclusion is inevitable. These rights, so carefully enumerated in the Constitution, and so often referred to by learned counsel, are liable to be abridged under particular circumstances. The Constitution contemplates and provides for such abridgment. This abridgment is especially provided for in time of war. And since no limits are fixed to the means to be used in war, every thing may be done which the necessities of war require. The laws of war are, for the time, as much a part of the Constitution as the laws of civil procedure are in time of peace.

My argument is founded on the idea that the laws of war are a necessary incident of a state of war, and, therefore, depend for existence only on the fact of war. It is quite unnecessary to refer to proclamations or advertisements of the fact. Order No. 38 is a proclamation, if it were a question of proclamations. Every branch of government, State and Federal, has made numerous announciations of this war. Counsel calls our attention to certain proclamations of the President relating to emancipation of slaves, which define, for that purpose, the insurrectionary districts; and counsel insists that these must be held as limiting martial law to those districts. Those proclamations do not include Missouri, Kentucky, Tennessee, Western Virginia, or portions of Eastern Virginia, or Norfolk or Portsmouth. If the laws of war depend on these proclamations, they are excluded from the places where the war has been most active. They did not purport to define the limits of war, but the limits of emancipation. If my argument is sound, neither the presence nor absence of proclamations can, materially, affect the question. It is a question of the existence of war.

It may be said that this argument, if correct, reduces us to a state of dependence on military power. Far otherwise. It is not a state to be argued into, or argued out of. If, when

threatened by Generals and armies who are traitors and enemies, we are obliged to depend upon Generals and armies who are patriots and friends, nothing can be gained by denying the fact, or by keeping up a false pretext of being in some other condition. The danger, whatever it may be, is not very much diminished by going into hysterics; nor is it greatly changed in its character by the names applied. It is sometimes called "*no law*"—"*an abrogation of law*"—"*a supension of law*," because for a time the ordinary civil administration is suspended or subordinated to a great public necessity. But the law provided for such occasions is in force. It is appealed to, to protect us when other laws fail.

The laws of war have their appropriate checks and limitations. The General in command of an army, in the field of his operations, for purposes of war, is expected to act with promptness, and sometimes with secrecy. He is not expected to write out and deliver his opinions, or to wait for briefs. This may be his misfortune; it certainly is not his fault. His action in this sense may be called "arbitrary," and his administration "despotic." But, after all, he is limited and restrained. If he push beyond the rights of war, the laws of war do not protect him. In applying those laws, he is further restrained by a sense of propriety and duty. He acts in peril of the disapprobation of higher authority, who may displace, or, in some cases, impeach, him; in peril of the disapprobation of the Supreme Being and of his countrymen; in peril of that sure infamy which awaits all who unnecessarily aggravate the evils of war. It is not easy to conceive a situation appealing to higher sanctions than that of a General commanding in war. "*At all events*," says General Burnside, "*I will have the consciousness before God of having done my duty to my country.*"

May it please your Honor! I have pursued this branch of the argument at some length. If the view of the Constitution here presented be, as it appears to me, well grounded in reason, and sustained by authority, the main proposition on which the petitioner rests his application is overthrown, and, with it, the claim to a writ of Habeas Corpus.

I did not understand counsel to argue that, in the case of Vallandigham, there were circumstances to render this arrest illegal or unnecessary, provided such arrests can in any case be justified. I did distinctly understand him to disclaim the idea that the Constitution permits a military arrest to be made, under any circumstances, of a person not engaged in the military or naval service of the United States, nor in the militia of any State called into actual service; and to rest his case on that broad denial. The whole petition is framed on this idea, for none of the charges are denied.

Upon first impression, your Honor may have inclined to the belief that petitioner had assumed an unnecessary burden, and might have more easily made a case by putting General Burnside to show the propriety of this arrest; admitting the general right to make such arrests as were indicated by the necessities of the service, but denying any ground for this arrest. But your Honor will find that no mistake has been made by learned counsel on the other side, in this particular. The circumstances shown justify the arrest, if any arrest of the kind can be justified. If General Burnside might have arrested him for making the speech face to face with his soldiers, the distance from them at which it was uttered can make little difference. He might make it in camp; and unless he could be arrested, there would be no way to prevent it. The right of publication, of sending by mail and telegraph, are of the same grade with freedom of speech. If utterance of the speech could not be checked, its transmission by mail and telegraph could not be. And I so understand the argument of the counsel of Vallandigham. It appears to claim, and go the whole length of claiming that it can do the army no harm to read such addresses; nor, of course, to hear them. It is necessary the argument should not stop short of that in order to meet the question, and it does not. Yet this is not the whole extent to which it must go to avail the petitioner. It must go to the extent of showing that this Court is authorized to determine that such addresses may be heard by the army, the opinion of the commanding General to the contrary notwithstanding. It goes and must go the extent of trans-

ferring all responsibility for what is called the *morale* and discipline of the army from its commanding General to this Court.

Is it not certain that if these addresses shall persuade nobody, their authors will be disappointed? Is it not certain that any soldier persuaded to believe that his government is striving to overthrow liberty, and for that purpose is waging a wicked and cruel war, can no longer, in good conscience, remain in the service? The argument leads to one of two conclusions. We are to be persuaded by the men who make the speeches, that the speeches will not produce the effect they intend—a persuasion in which their acts contradict their words—or we are to consent to the demoralization of the army. The Constitution authorizes and even requires the army to be formed, but at that stage of the transaction interposes an imperative prohibition against the usual means of making it effective.

It is said, however, that the charges against Vallandigham are triable in the civil tribunals. So are a large proportion of all the charges which can be brought against any one engaged in an insurrection. No rebel soldier has been captured in this war, no guerrilla, who was not triable in the civil tribunals. The argument in this, as in other particulars, necessarily denies the applicability of the laws of war to a state of war.

Learned counsel on the other side has cited to us and read passages from decisions and text-books, on two points, the relevancy of which to the question now before us I am not able to perceive. One series of these citations reminds us of arrests which were not made in accordance with any laws, either of peace or war, which were declared illegal and punished. I can, if he shall think them useful, furnish him many more of the same kind. But I am under an impression that when an arrest has been shown to be illegal, no further authority will be necessary to show that the person making it is liable to punishment. He has read to us an account of the execution of Governor Wall. *After peace had been restored*, and *after a pretended but illegal trial by court-martial, he caused a punishment to be inflicted which resulted in the death of the soldier punished!* He was himself punished for the act. What has that to do here?

He cites to us a case where a justice of the peace, *not liable to military duty*, had been fined by a militia court-martial, *which had no jurisdiction over him*, for omitting to do what he was not bound to do; and the whole proceeding was declared illegal. What has that to do here? He cites to us a case, growing out of the celebrated John Wilkes controversy, where arrests were made, and houses and papers searched, *under a pretended warrant, issued by a person having no right to issue a warrant.* It was a trespass, and the jury put on, as they ought, heavy damages. What has that to do here?

I need not follow these citations. None of them have any other bearing that I am able to perceive, than to show that illegal arrests are not to be justified. Who claims that they are? None of these citations show, or tend to show, that the arrest here is not in accordance with the laws of war. It comes back to the original question. In time of war, do the rules of war prevail? If they do, arrests made in accordance with them are legal. If they do not, every rebel who has been captured has his action of trespass and false imprisonment against the soldiers who captured him. If they do not, every soldier who has killed his enemy in battle is liable to be prosecuted for it as a crime. This is the only alternative. Need I pursue the argument?

Another class of authorities cited by counsel bears upon the old and familiar doctrine of constructive treason. Its bearing on the question before the Court I am not able to discover. But since there may be some connecting link, not visible to the naked eye, let me say that, on the strength of his own citations, I should expect your Honor to feel compelled to instruct the jury, if Vallandigham were now on trial before a jury, charged with treason, that the case was a serious one, and deserved their most solemn deliberation. His citation from Blackstone gives us a clue, if one were needed, to the whole labyrinth. "How far mere words, spoken by an individual, and NOT RELATIVE TO ANY TREASONABLE ACT OR DESIGN THEN IN AGITATION, shall amount to treason, has been formerly matter of doubt." So in his citation from 1 Hale's Pleas of the Crown, 146, a bare detainer, or shutting the gates,

against the government, might not amount to treason. "*But if this be done* IN CONFEDERACY WITH *enemies, or rebels, that circumstance will make it treason.*" Again, his citation from 4 Cranch, 127: "It is not the intention of the Court to say, that no individual can be guilty of this crime who has not appeared in arms against his country. *On the contrary, if war be actually levied, that is, if a body of men be actually assembled*, for the purpose of effecting, by force, a treasonable purpose, ALL THOSE WHO PERFORM ANY PART, HOWEVER MINUTE, or HOWEVER REMOTE from the scene of action, and who are actually leagued in the general conspiracy, *are to be considered as traitors.*"

Admitting that words, or a mere conspiracy to levy war, no war being yet levied; or enlisting of men for war, no war being yet levied, do not amount to actual levying of war, the whole doctrine claimed by counsel, yet the case of Vallandigham has not been reached. *War is levied. A body of men is assembled for the purpose of effecting, by force, a treasonable purpose.* This body of men has military occupation of a large part of the country. There is no doubt of the establishment of this part of the case. What follows? The Court would tell the jury that "all those who perform *any* part, however *minute*, or however *remote* from the scene of action, and who are actually leagued in the general conspiracy, are guilty of treason." The Court would tell the jury, that the acts of Vallandigham were not too minute nor too remote for guilt. The question for them would be, whether he was actually leagued in the general conspiracy? And this they would be able to form their opinion upon from all the circumstances. They must impute to him a design to accomplish just what his actions had a tendency to accomplish; this is the only legal way of ascertaining motives. Were the acts of Vallandigham apparently aimed at the same result with the acts of those unequivocally engaged in open treason? His determination to resist Order No. 38, which forbade lending assistance to the rebellion, was a circumstance. His former and present relations with the leading traitors might be considered. His pretended knowledge of terms offered by those engaged in the rebellion, to the government, not known to the loyal part of the

people, and his hearty indorsement of their side of the negotiation, might be considered. The jury must remember that many things besides bearing arms were necessary to the success of the general purpose, and so on. If the charges against Vallandigham, which stand here without denial, are true, his conviction of treason, before an impartial jury, would be almost certain. But on an application for a Habeas Corpus, the Court does not determine the question of guilt or innocence. I can not, therefore, see the relevancy of this part of the argument.

Learned counsel has read to us certain resolutions of the Ohio Legislature, said to have been adopted during the Mexican war, strongly pronouncing against that war, and advising its discontinuance. Does he claim that there was then on foot any military force levying a *treasonable* war against the United States? What, then, has that to do here? What, in any event, has it to do here? Does he claim that those resolutions were justifiable?

Among the numerous instances cited of constructive treason, is one quite touching. A man, whose deer had been killed by the king, wished it, horns and all, in the king's belly. The judge is reported to have held this to be a treasonable saying, and the man was executed. The horns might have been troublesome, but one would think the horns part might have been pardoned or condoned, considering the manifest benevolence of wishing all the rest of the deer there, also. Why, counsel is seeking to impress us with a sense of the danger of allowing any kind of cases to be withdrawn from the courts; and he reads us instances showing that whatever abuses may have been committed by military men, they fall short of the abuses committed by courts and juries! What has all that to do here?

May it please your Honor! I must bring this argument to a close. Are we in a state of war or not? Did the Constitution, when it authorized war to be made, without limitations, mean war, or something else? The judicial tribunals provided for in the Constitution, throughout twelve States of the Union, have been utterly overthrown. In several other States they are maintain-

ing a feeble and uncertain hold of their jurisdiction. None of them can now secure to parties on trial the testimony from large portions of the country, to which they are entitled by the Constitution and laws. The records of none of them can be used in the districts dominated by the insurrection. They are all struck at by this insurrection. Counsel tells us that, except the Union provided for in the Constitution, there is no legal Union. Yet that Union is, temporarily I hope, but for the present, suspended and annulled. This Court can have no existence except under that Union, and that Union now, in the judgment of those who have been intrusted by the Constitution with the duty of preserving it, depends upon the success of its armies. The civil administration can no longer preserve it.

The courts which yet hold their places, with or without military support, may perform most useful functions. Their jurisdiction and labors were never more wanted than now. But they were not intended to command armies. When Generals and armies were sent here, they were sent to make war according to the laws of war. I have no authority from General Burnside to inquire, and I have hesitated to inquire, but, after all, will venture to inquire, whether an interference by this Court with the duties of military command must not tend to disturb that harmony between different branches of government, which, at this time, is most especially to be desired?

Counsel expresses much fear of the loss of liberty, through the influence of military ascendency. Are we, on that account, to so tie the hands of our Generals, as to assure the overthrow of the Constitution by its enemies? I do not share that fear. It has been the fashion of society in many countries to be divided into grades, and topped out with a single ruling family. In such societies the laws and habits of the people correspond with its social organization. The two elements of power—intelligence and wealth—are carefully secured in the same hands with political power. It has happened in a number of instances, that a successful General gained power

enough to push the monarch from his throne and seat himself there. In such instances the change was chiefly personal. Little change was necessary in the social organization, laws or habits. It has also happened that democracies or republics, which have, by a long course of corruption, lost the love and practice of virtue, have been held in order by a strong military hand. But in this country no man can gain by military success a dangerous ascendency, because the change would require to be preceded by a change in the whole body of laws, in the habits, opinions, and social organization. History furnishes no example of a successful usurpation under similar circumstances, and reason assures me it would prove impossible. Our society has no element on which usurpation could be founded. My sleep is undisturbed, and my heart quite fearless in that direction. I do not fear that we shall lose our respect for the laws of peace by respecting the laws of war; nor our love for the Constitution by the sacrifices we make to uphold it. I do not fear any loss of democratic sympathies by the brotherhood of camps. I do not fear any loss of the love of peace by the sufferings of war. I am not zealous to preserve, to the utmost punctilio, any civil right at the risk of losing all, when all civil rights are in danger of overthrow. The question of civil liberty is no longer within the arbitrament of our civil tribunals. It has been taken up to a higher court, and is now pending before the God of Battles. May he not turn away from the sons whose fathers he favored! As he filled and strengthened the hearts of the founders of our liberty, so may he fill and strengthen ours with great constancy! Now, while awaiting the call of that terrible docket, while drumbeats roll from the Atlantic Ocean to the Rocky Mountains, while the clear sound of bugles reaches far over our once peaceful hills and valleys; now, when the hour of doom is about to strike, let us lose all sense of individual danger; let us lay upon a common altar all private griefs, all personal ambitions; let us unite in upholding the army, that it may have strength to rescue from unlawful violence, and restore to us the body of the American Union—*E Pluribus Unum!* Above all, O Almighty God! if it

shall please thee to subject us to still
if it be thy will that we pass furthe
ness of disorder, yet may some little
move thee to a touch of pity! Spare us from that last human degradation! Save! O save us from the littleness to be jealous of our defenders!

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